DOCKET

No. 09-5731 *** CAPITAL CASE ***

Title: Marcus A. Wellons, Petitioner

v.

Hilton Hall, Warden

Docketed: August 5, 2009

Lower Ct: United States Court of Appeals for the Eleventh Circuit

Case Nos.: (07-13086)

Decision Date: February 5, 2009

Rehearing Denied: March 5, 2009

Date	Proceedings and Orders
May 21 2009	Application (08A1045) to extend the time to file a petition for a writ of certiorari from June 3, 2009 to August 2, 2009, submitted to Justice Thomas.
Jun 2 2009	Application (08A1045) granted by Justice Thomas extending the time to file until August 2, 2009.
Aug 3 2009	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 4, 2009)
Aug 12 2009	Brief of respondent Hilton Hall, Warden in opposition filed.
Aug 27 2009	DISTRIBUTED for Conference of September 29, 2009.
Sep 10 2009	Record Requested .
Sep 28 2009	Record received from United States District Court Northern District of Georgia (7 boxes).
Oct 7 2009	Record received electronically from the U.S. Court of Appeals for the 11th Circuit.
Oct 8 2009	DISTRIBUTED for Conference of October 30, 2009.
Nov 2 2009	DISTRIBUTED for Conference of November 6, 2009.
Nov 9 2009	DISTRIBUTED for Conference of November 13, 2009.
Nov 19 2009	DISTRIBUTED for Conference of November 24, 2009.
Nov 30 2009	DISTRIBUTED for Conference of December 4, 2009.
Dec 7 2009	DISTRIBUTED for Conference of December 11, 2009.
Jan 4 2010	DISTRIBUTED for Conference of January 8, 2010.
Jan 11 2010	DISTRIBUTED for Conference of January 15, 2010.
Jan 19 2010	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. Judgment VACATED and case REMANDED for further consideration in light of Cone v. Bell, 556 U.S. (2009). Justice Scalia filed a dissenting opinion in which Justice Thomas joins. Justice Alito filed a dissenting opinion in which the Chief Justice joins. Opinion per curiam. (Detached Opinion)
Feb 22 2010	JUDGMENT ISSUED.

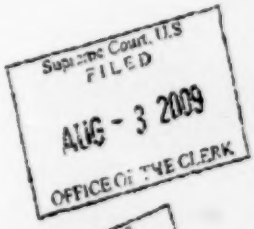
PETITION FOR WRIT OF CERTIORARI

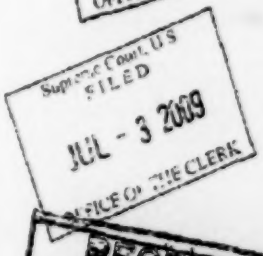
IN THE

SUPREME COURT OF THE UNITED STATES

08-5781

No. 08-





MARCUS A. WELLONS,
Petitioner,

versus,

HILTON HALL, Warden,
Respondent.

Motion for Leave to Proceed
in Forma Pauperis

COMES NOW Petitioner, MARCUS A. WELLONS, pursuant to Sup. Ct. Rule 39, and moves for leave to proceed *in forma pauperis*.

1) Mr. Wellons was determined indigent, pursuant to 18 U.S.C. §3006A, by the United States District Court for the Northern District of Georgia. Counsel was appointed to represent him in the district court and later on appeal before the court of appeals.

2) Mr. Wellons remains indigent and wishes to pursue a writ of certiorari from this Court to the United States Court of Appeals for the Eleventh Circuit, which on January 5, 2009 (amended February 5, 2009), affirmed the district court's denial of habeas corpus relief and on March 5, 2009, denied a petition for rehearing.

WHEREFORE, Mr. Wellons asks this Court to grant his motion and allow him to proceed *in forma pauperis*.

Respectfully submitted this ____ of _____, 2009.

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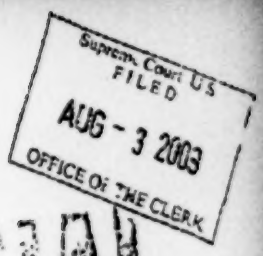

IN THE

SUPREME COURT OF THE UNITED STATES

No. 08-

MARCUS A. WELLONS,
Petitioner,

versus,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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CAPITAL CASE

QUESTIONS PRESENTED

I. Whether the Eleventh Circuit's procedural default of Petitioner's claims of juror, bailiff and judge misconduct is in conflict with the this Court's holding in *Cone v. Bell*, 556 U.S. ___, 129 S.Ct. 1769 (2009), and prior holdings of this Court?

II. Whether the lower courts denial of discovery or an evidentiary hearing regarding Mr. Wellons' claims of juror, judge and bailiff misconduct arising from the jurors' gift of a chocolate penis and breasts to the judge and bailiff and the unreported ex parte communication between the judge and jury is inconsistent with this Court's precedent?

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 08-___

MARCUS A. WELLONS,
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versus,

HILTON HALL, Warden,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Mr. Wellons respectfully petitions this Court to review the decision of the United States Court of Appeals for the Eleventh Circuit.

JURISDICTION AND LOWER COURT OPINION

The opinion of the United States Court of Appeals for the Eleventh Circuit is published at 554 F.3d 923 (11th Cir. 2006), and is reprinted at Appendix A. The Eleventh Circuit opinion issued January 5, 2009, and was amended on February 5, 2009. Rehearing was denied on March 5, 2009. *See* Appendix B. The opinion of the district court, which is unpublished, was entered on February 20, 2007. *See* Appendix C. Jurisdiction is invoked under 28 U.S.C. § 1254 (1). An application for extension of time to file a petition for certiorari was granted by Justice Thomas making the petition due on August 2, 2009.[1]

[1]As August 2, 2009 falls on a Sunday, Mr. Wellons' Petition for Writ of Certiorari is due to be filed on Monday, August 3rd, 2009. *See* Supreme Court Rule 30(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence, U.S. CONST. amend. VI;

The Eighth Amendment to the Constitution:

> excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted U.S. CONST. amend. VIII;

The Fourteenth Amendment to the Constitution:

> no State shall . . . deprive any person of life [or] liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1; and

Section 2254 of Title 28 of the United States Code, which states in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States ....

STATEMENT OF THE CASE

A. The Crime

On August 31, 1989, Marcus Wellons was arrested for the murder of India Roberts. To the friends and family of Mr. Wellons, this came as a surprise. Mr. Wellons was a thirty-two year old college graduate with no criminal convictions except for minor traffic offenses, not someone likely to end up on trial for murder. But Mr. Wellons had a history that he had worked hard to forget, a history that would haunt him for the rest of

his life.

Marcus Wellons had grown up in a low income apartment building in a rough section of Miami, Florida, with his parents and siblings. His father was physically abusive to both his wife and the children, targeting Marcus among the children as the child who received the brunt of his anger. Marcus' father often told him he was not his son, and beat him with whips, extension cords, shoes, clothes hangars, and even a water hose. One particularly terrifying form of abuse that frequently occurred was when Marcus' father would threaten the family with a gun saying he should kill all of them and hold the gun to his wife's head and pull the trigger. On the one occasion Marcus tried to intervene, his father threw him against the wall, pointed the gun at him, pulled the trigger and told Marcus that if he ever tried to intervene again he would kill him. Because his father would take his mother's earnings and leave the home for days on end, Marcus home life was also marked by extreme poverty where the family would have no food, electricity or water.

Despite the odds against it, Wellons excelled as an adult. He was the first in his family to enter the Army, from which he received an honorable discharge. He was the first in his family to graduate college, where he excelled as a star student and as President of the Spanish Club. He had a good job during college, and after graduating, worked several jobs including three years as a counselor at a halfway house for Marialito Cubans. Although Mr. Wellons made great strides to overcome the demons from his past they began to have an effect. He had difficulties in his relationships with women. Like his father, he was abusive to his spouse, but, unlike his father, he recognized this as a problem and sought counseling. He had problems with substance abuse, including both alcohol and drugs, but for the most part had managed to keep these problems in check.

The facts and circumstances surrounding the death of India Roberts are strange. Mr. Wellons lived in an apartment complex with his girlfriend, Gail Saunders, and her teenage son. Ms. Roberts lived in the same apartment complex and was friends with Gail's son and had visited Gail on numerous occasions. On August 30, 1998, the evening before the incident, Mr. Wellons was under a great deal of stress. He had recently been fired from his job, was breaking up with his girlfriend and about to move. Gail left the apartment for the evening, telling Mr. Wellons she was going to her parents. Mr. Wellons began drinking and made several incoherent phone calls to family members and an old girlfriend. He wrote a note to Gail stating that he was in love with her and that she had hurt him, and that he was in the worst psychological state of his life. This note was discovered later in his apartment by the police, crumpled and in a trash can.

In the early morning hours of August 31, Mr. Wellons wrecked the apartment and called the police making a false report of a crime. There were racial slurs written on the walls and a window was broken. Mr. Wellons initially mentioned no suspects in the alleged burglary, but later told officer that he had come home to find two white men burglarizing the apartment. According to Mr. Wellons, these men attacked him and in the ensuing fight he was cut. The officer noted that Mr. Wellons was intoxicated. The officer also noted that the physical evidence was at odds with Mr. Wellons' version of events.

On the morning of August 31, Ms. Roberts left her apartment between 7:45 and 8:00 a.m. to catch the bus. Around the same time, a neighbor saw Mr. Wellons outside by the dumpster, kind of staggering. After going insider her apartment, which adjoined Mr. Wellons' apartment, the neighbor heard muffled screams coming from the direction of the apartment which lasted 20-30 seconds. It was later determined that the time of death

likely occurred shortly after Ms. Roberts was last seen.

The evidence supported a finding that the homicide was not premeditated. Mr. Wellons had no vehicle with which to remove the evidence. After frantically trying to borrow a car, Mr. Wellons wrapped up the corpse in a sheet and in broad daylight, carried it under his arm down a busy narrow sidewalkless street. He disposed of the body about one hundred yards from his apartment and returned to his apartment. After a passerby reported seeing Mr. Wellons walking down the street carrying what appeared to be a body, the police came and located Ms. Roberts' body. Ms. Roberts had been sexually assaulted and had died from manual strangulation. There were items linking Mr. Wellons to the place where Ms. Roberts' body was found, including school books with Gail's son's name written across them and sheets belonging to Gail's family. When the police searched Mr. Wellons' apartment later that day they found it demolished, with clear evidence tying Ms. Roberts to the scene. Officers at the scene encountered Mr. Wellons who was dressed in a swimsuit with a cup of wine in his hand. He smelled of alcohol and several officers testified it was obvious he had been drinking. He was subsequently arrested after being identified by the man who saw him carrying the body.

B. The Trial

Mr. Wellons was tried by a jury in Cobb County, Georgia, on May 9, 1991. There were eleven white jurors and one African-American juror. Although Mr. Wellons entered a not guilty plea, he did not dispute his guilt but instead urged the jury to enter a verdict of not guilty by reason of insanity or guilty but mentally ill. During the penalty phase closing argument of the prosecution the trial judge openly wept in the presence of the jury. After hearing the evidence, the jury found Mr. Wellons guilty of malice murder and rape and sentenced him to death.

C. Post-trial

Following the trial, trial counsel undertook to interview the jurors in the case. Although many of the jurors refused to talk to him, the ones that did had a most bizarre story to tell (*see* D50-Petitioner's Proffer of Evidence - 2/5/98). The jury had been sequestered throughout the trial. As is common with jurors in capital cases, they ate all of their meals together and stayed in the same hotel. At some point, either during or immediately following the penalty phase, several of the jurors gave the female trial judge an edible chocolate penis and a female bailiff edible chocolate breasts (*Id.*). Neither the bailiff nor the judge informed trial counsel of this contact with the jurors nor of the receipt of these gifts, nor did the judge conduct a hearing concerning this conduct with the jury (D5-Motion to Recuse Judge).

During the interviews of the jurors, trial counsel also learned that they had unreported contact with the judge during the trial (D50-2/5/98 Proffer). At one meal at a local restaurant, the jurors were eating dinner in a separate room away from the other diners (*Id.*). During the meal, the judge entered the room where they were eating and spoke to them (*Id.*). The extent or content of the conversation is unknown. Neither Mr. Wellons nor his counsel were present during this conversation. At no time subsequent to this event did the trial judge disclose this incident to the parties or conduct a hearing concerning this encounter with the jurors.

As the case was still pending on motion for new trial before the trial judge when these facts were discovered, trial counsel immediately filed a Motion to Recuse the Judge with supporting facts, which was denied (D5; *see also* D50-11/13/93-Transcript of Motion to Recuse). Thereafter, Mr. Wellons raised the claims on direct appeal (Petitioner's Brief on Direct Appeal, PP91-92, 97-98), but this was also denied. *Wellons*

v. State, 266 Ga. 77, 463 S.E.2d 868 (1995).

On state habeas, new counsel again attempted to litigate these issues. An initial state habeas hearing was held on December 3, 1997 (D5-RX49). Prior to the hearing, state habeas counsel orally informed Respondent that he intended to depose the jurors, the bailiffs, the trial judge, the court reporter, and the judge's secretary, so that he could question them concerning their knowledge of these gifts and the contact with the judge. Respondent promptly filed a Motion for a Protective Order to prevent these depositions (D50-PP841-854). In these motions, Respondent argued that the claims concerning the misconduct of the jurors, judge and bailiff were procedurally defaulted for failure to raise on direct appeal (D50-11/20/97 Motion, P1,3) and, in the alternative, that the claims may be considered to be *res judicata* (*Id.* at 5). Petitioner issued subpoenas for these witnesses prior to the December 3, 1997, hearing.

The majority of the December 3, 1997, hearing concerned the claims of the juror, judge and bailiff misconduct and whether these claims were properly in front of the habeas court (D4-RX49). Respondent contended that the court should not consider the testimony because the issues were either *res judicata* or procedurally defaulted (*Id.* at 5-8, 27-32). The parties addressed the difference between a finding of *res judicata* and procedural default and the impact either finding would have on what evidence was presented.[2] After hearing argument from both sides, the court concluded that "the issues that would be approached with the trial jurors, the trial judge, the court clerk, the judge's

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[2]Petitioner's state habeas counsel noted "But, even if you accept their argument in terms of procedural default, and procedural default is a doctrine, *once a court says this claim is defaulted, then you have still got issues of whether there is cause for the default, whether there is prejudice as a result of the default, or whether there might be a miscarriage of justice based upon the claim. And all of those questions are questions of fact that require evidence.*" (*Id.* at 25; emphasis added); *see also id.* at 3-4, 5, 29 (argument by Respondent).

secretary, and the three bailiffs are *res judicata*", and thus Appellant could not present evidence on those issues (*Id.* at 33).

The state habeas court granted Respondent's motion to quash the judge, juror and bailiff subpoenas (D5-RX49-P33-34), and permitted state habeas counsel to proffer what information he had been able to get from interviews with the jurors prior to his order (D50-Petitioner's Proffer of Evidence-2/5/98; *See* District Court final order, App. 3 - pp. 35-38 - proffer of evidence).

Trial counsel testified in a subsequent state habeas hearing held February 4, 1998. When state habeas counsel attempted to question trial counsel about his knowledge of the misconduct, Respondent objected to the question stating, "I am going to object to going into this whole area since it has already been ruled *res judicata*" and "I am objecting to the misconduct of the bailiff, the jurors, and the judge has already been ruled on" by the habeas judge (D5-RX50-P53). The Court reiterated the ruling during a discussion of the jurors at the conclusion of the February 4, 1998, hearing, "[T]he Court had ruled that those issues [regarding juror misconduct] were *res judicata*" (*Id.* at 168). Following the February 4, 1998, hearing, Mr. Wellons renewed his request to interview the jurors, judge, bailiffs, and other related parties in the district court (D33), but this request was denied (D55). To date, none of the parties involved in this misconduct have testified under oath and no evidentiary hearing has been held on the issues

Both parties submitted Proposed Findings of Fact and Conclusions of Law in state court. With respect to the juror misconduct claim, the Respondent submitted "Ground Two [] in which Petitioner asserts that the jury in his case was engaged in misconduct [] was raised and decided adversely to Petitioner on direct appeal. Appellant's Brief pp. 90-98. *Wellons*, 266 Ga. at 88-89 (12,19,20)." (D5-RX62-P6). The habeas court restated its

oral findings of *res judicata* regarding the misconduct by the jurors and judge in its order denying the writ (D5-RX64-PP7).

In the petition filed in federal court, Mr. Wellons raised the issues of juror misconduct (Claim 28), judge misconduct (Claim 29), and bailiff misconduct (Claim 30), surrounding the giving of these very inappropriate gifts to the judge and the bailiff and the unreported contact between the actors during the trial. Despite the clear finding of *res judicata* by the state court, the district court found the claim regarding the misconduct of the jurors (Claim 28) to be procedurally defaulted and refused to consider the claim. Mr. Wellons also sought discovery in the district court, requesting the right to interview the jurors, judge, and bailiff, and sought an evidentiary hearing on these issues. The district court did not dispute that Mr. Wellons had been diligent in his efforts to pursue the claims of juror, judge, and bailiff misconduct in state court (District Court Final Order, App. C, p. 32). The court denied Mr. Wellons' requests for discovery with regard to the jurors and the bailiff as these issues were found to be procedurally defaulted (D55-P9-10).[3] The court denied Mr. Wellons request for discovery regarding judicial misconduct, finding that Mr. Wellons had not established "good cause" with respect to the request (D55-P10). The district court also denied Mr. Wellons an evidentiary hearing on these claims, relying both on the fact that the claims were procedurally defaulted (App. C - p. 10) and on a finding that Petitioner had not demonstrated that the facts as presented would entitle him to relief (*Id.* at 31).

In its opinion affirming the district court, the Eleventh Circuit concluded as a matter of law that the state habeas court had found the claims concerning juror, judge and

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[3]In a subsequent ruling the district court found that the issue regarding the bailiff misconduct was not procedurally defaulted, but did not revisit the question of discovery with respect to this claim.

bailiff misconduct to be *res judicata* (*Wellons v. Hall*, 554 F. 3d at 936). The Eleventh Circuit then held "As the state habeas court's ruling regarding these claims rests on an adequate and independent state procedural ground, the district court correctly found these claims procedurally barred from federal habeas review" (*Id.*). The Court of Appeals found that "Wellons was not entitled to discovery or an evidentiary hearing because the record reveals that his claims of judge, juror, and bailiff misconduct are procedurally barred from federal habeas review." (*Id.* at 935). The Court of Appeals then addressed whether relief would be granted if the claims were not procedurally defaulted, and found that it would not (*Id.* at 936-38). The Court of Appeals based its ruling solely on evidence that Mr. Wellons was able to gather and present prior to the state habeas court's ruling that he could not present evidence to support his claims. The Court of Appeals did not address the question of how these objects were obtained by a sequestered jury.

REASONS FOR GRANTING THE WRIT

I. Certiorari is Warranted to Resolve the Conflict Between the Ruling Below and the Decision of this Court in *Cone v. Bell* and its Precedent.

Georgia state courts employ the doctrine of *res judicata* (Georgia labels it a "procedural bar" when a claim raised in post conviction was ruled upon on the merits on direct appeal) to bar review of matters that have been previously litigated. *See Elrod v. Ault*, 231 Ga. 750, 204 S.E. 2d 176 (1974); *Gunter v. Hickman*, 256 Ga. 315, 348 S.E. 2d 644 (1986). If a defendant simply fails to assert an issue in a prior matter and attempts to assert it in a subsequent matter in state court, the Georgia state court procedurally defaults the issue. *See Black v. Hardin*, 255 Ga. 239, 336 S.E. 2d 754 (1985); *Valenzuela v. Newsome*, 253 Ga. 793, 325 S.E. 2d 370 (1985); O.C.G.A. sec. 9-14-48 (d). The rulings have different consequences for the defendant as the issue that has been found to be *res judicata* has been properly presented to the state court and the issue that the state court

has procedurally defaulted is procedurally barred for federal review.

Because federal habeas corpus subjects state criminal judgments to scrutiny and possible reversal under federal law, it has long been understood that federal habeas corpus is an exception to the rule of *res judicata*. *See, e.g., Keeney v. Tamayo-Reyes*, 504 U.S. 1, 15 (1992) (O'Connor, J., dissenting) (A state prisoner is not precluded from raising a federal claim on habeas that has already been rejected by the state courts."). A contrary approach would put the rule at odds with other doctrines that have been developed to ease the inherent conflict between state and federal interests in the process of habeas corpus review. Federal habeas petitioners are required to exhaust all claims in state court prior to asserting them in federal court. *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). The Court of Appeal's decision, that Mr. Wellons is precluded from proceeding on a claim that was properly presented to the state court but was not considered in a subsequent state court proceeding *solely because it had previously been litigated in state court*, is contrary to this Court's precedent and the precedent of the Eleventh Circuit. Because prior state adjudication is a prerequisite, not a bar, to federal adjudication, this rule cannot stand. *See Boyer v. White*, 763 F. 2d 1012 (8th Cir. 1985) (district court erred in dismissing federal habeas corpus petition on ground that state court previously had rejected petitioner's claim).

This Court recently addressed this issue in *Cone v. Bell*, 129 S.Ct. 1769 (2009). Faced with a similar issue, this Court held "[w]hen a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review." *Id.* at 1781. This Court went on to say that, consistent with its earlier observations in *Ylst v. Nunnemaker*, 501 U.S. 797, 804, n.3. (1991), a state court refusal to consider a claim previously adjudicated in state court has no impact on the

federal court as the state court ruling neither erects a procedural default or lifts a procedural default. *Cone*, 129 S.Ct. at 1781. Finally, the Court noted that rather than providing a procedural bar prohibiting federal court review, a state court's refusal to relitigate a claim previously considered, the state's action "provides strong evidence that the claim has already been given full consideration by the state courts and thus is *ripe* for federal adjudication." *Id.*

Subsequent to the Eleventh Circuit ruling in Mr. Wellons' case and to this Court's ruling in *Cone*, the Eleventh Circuit had the occasion to consider a similar issue in another case. In *Owen v. Sec. for the Dept. of Corrections*, 568 F. 3d 894 (11th Cir. 2009), the Eleventh Circuit was faced with the question of whether claims that had been barred from collateral review by the Florida state courts because they had been previously rejected on the merits on direct appeal, were properly procedurally barred from federal habeas review, *Id.* at 914, based on a scenario identical to that in Mr. Wellons' case. Citing *Cone*, the *Owen* court found that this scenario created no bar to federal habeas review. *Owen,* 568 F. 2d at 914-15. The Eleventh Circuit then noted that they had recently ruled in a contrary fashion in *Wellons* and concluded that "[i]n any event, the Supreme Court's pronouncement in *Cone* overrules that part of the *Wellons* decision." *Id.* at 915, n. 23.

As in *Owen*, the state court (the Georgia Supreme Court) in *Wellons* did consider and reject the merits of the claim. A subsequent state post-conviction court refused to consider the claim, not because it had not been properly asserted at the earliest possible juncture, but because it had already been reviewed in state proceedings. The procedural default doctrine established in *Wainwright v. Sykes*, 433 U.S. 72 (1977), applies to cases in which the defendant has defaulted federal claims "pursuant to an independent and

adequate state procedural rule." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The state court did not find that Mr. Wellons had defaulted the claim in state court but that it had previously been litigated on direct appeal. Thus, the highest state court to consider the claim, the state habeas court, did not impose a procedural bar. Because the state court did not find a procedural bar, there is no federalism basis for deferring to any adequate and independent state procedural bar, and the state cannot claim that the state court was deprived of an opportunity to review the claim. *Cone v. Bell supra; Owen v. Sec. for Dept. of Corrections, supra; Blanco v. Singletary*, 943 F. 2d 1477, 1498-99 (11th Cir. 1991)(because the Florida Supreme Court did not explicitly assert a procedural bar the claim is properly before the federal court); *Remeta v. Singletary*, 85 F. 3d 513, (11th Cir. 1996)(although state court ruling was not a model of clarity, there was no clear procedural bar so federal rule was not precluded); *accord LeCroy v. Sec'y, Fla. Dep't of Corr.*, 421 F.3d 1237, 1260 (11th Cir.2005) (if claim "was raised on direct appeal in state court, it was necessarily ruled upon and might very well be foreclosed from state collateral attack, but it would be available in the federal case as an exhausted); *Smith v. Dugger*, 840 F.2d 787, 791 (11th Cir.1988) (same).

The Eleventh Circuit ruling in Mr. Wellons' case is in direct conflict with this Court's precedent and with prior Eleventh Circuit rulings. A grant of certiorari is warranted.

II. The Court of Appeals Finding That These Claims Are Procedurally Defaulted Has Denied Mr. Wellons the Opportunity To Question The Only Witnesses With Regard To These Claims and To Present Evidence to Support These Claims.

A. Critical questions remain unanswered because of the rulings of the lower courts which are in direct conflict with this Court's precedent.

There were three separate incidents of misconduct in this case involving the judge,

the jurors and the bailiff. There are several key questions which remain unanswered and will continue to be unanswered until there is a hearing on the issues. First, and perhaps most important, is what is the extent of contact between the jurors and the judge that would give them the impression it is okay to give her a chocolate penis in a death penalty trial. This was a case that involved the rape and murder of a young woman. This was a case that required the decisionmakers to listen closely to the evidence, seriously consider all of the issues, and determine whether a man should live or die. There is nothing in the record that would support a finding that the judge and jury had fostered the type of relationship that would allow them to feel such a gift was appropriate, particularly given the facts of the case and the job they were charged with doing.

Secondly, how does a jury that is sequestered, whose moves are monitored at all times, manage to procure a chocolate penis and chocolate breasts? What type of contact existed between the person or persons who brought the confectionary genitals to the jurors and the jurors who received the confectionary genitals. Was there improper extraneous information passed to the jurors from the person who brought them the confectionary genitals?

Third, why did neither the judge nor the bailiff inform trial counsel of the contact between the court and the jurors at the restaurant, or of the receipt of these gifts? Judges routinely conduct hearings on contact that has occurred between jurors and others during a trial. It is the responsibility of the bailiffs to guarantee that the rules concerning juror sequestration are followed and that no improprieties occur concerning the jury. Yet that did not happen in this case.

Fourth, is the gift of a chocolate penis and chocolate breasts by the white members of the jury where the defendant and victim are both African-American, evidence of

racism that has impermissibly tainted the jurors decision making process?

The questions have not been answered because the federal courts improperly erected procedural defaults to the claims, and denied Mr. Wellons the opportunity to conduct discovery or to present evidence at an evidentiary hearing. The trial judge's denial of the motion to recuse perpetuated the veil of secrecy over these incidents by making herself unavailable as a witness

B. The lower court holding that Mr. Wellons should be denied both discovery and an evidentiary hearing is in conflict with the teachings of this Court.

The misconduct by the judge, jury and bailiff denied Mr. Wellons a fair and impartial jury trial, the due process of law, the right to effective assistance of counsel, and the right to have a jury whose decisions were not guided by racism, as guaranteed by the United States Constitution. In his Motion for Discovery, Mr. Wellons requested permission to depose twenty-seven people who might have knowledge of the facts of the gifts giving and the undisclosed contact with the judge, including the jurors, the judge, and the bailiff. The court of appeals held that Mr. Wellons was not entitled to discovery or an evidentiary hearing because the claims of judge, juror and bailiff misconduct were procedurally defaulted. *Wellons*, 554 F. 3d at 935.[4] As the ruling that Mr. Wellons claims are procedurally defaulted is in conflict with this Court's precedent, it follows that the lower court holding denying discovery and an evidentiary hearing based on the purported procedural default are also in conflict.

A hearing is required in federal court if three conditions are met: 1) the petition alleges facts that, if proved, entitle the petitioner to relief, 2) the claims survive summary

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[4]As noted in the Statement of the Case, the district court found that Mr. Wellons had failed to show good cause why he should obtain discovery with respect to the judge.

dismissal because their factual allegations are not palpably incredible or patently frivolous or false, and 3) the factual claims were not previously the subject of a full and fair hearing in state court for reasons beyond the control of the petitioner. *See Townsend v. Sain*, 372 U.S. 293, 312 (1963); *Harich v. Dugger*, 844 F. 2d 1464, 1469 (11th Cir. 1988)("Petitioner is entitled to an evidentiary hearing if his allegations, taken as true, might merit relief."); *Agan v. Dugger*, 835 F. 2d 1337, 1338 (11th Cir. 1987) ("[a]n evidentiary hearing is necessary whenever a habeas petitioner alleges facts that, if true, establish his or her right to relief"). Although 28 U.S.C. § 2254(e)(2) narrowed the right to an evidentiary hearing, the proscriptions of 2254(e)(2) do not apply when the petitioner has exercised due diligence in seeking an evidentiary hearing and the failure of the state court to hold a full and fair hearing cannot be attributed to him. *Matheny v. Anderson*, 253 F.3d 1025, 1039 (7th Cir. 2001).

The district court found that Mr. Wellons worked "diligently to litigate his claims of juror, judge, and bailiff misconduct" in the state habeas court but that the state court would not permit a hearing on the claims (D64-34), thus Mr. Wellons has satisfied the third condition necessary to establish the right to an evidentiary hearing. Mr. Wellons submits that he has also met the second prong as the claims are not palpably incredible or patently false. Before the state court quashed Mr. Wellons' subpoenas, some of the jurors agreed to speak and revealed the gift giving and the previously undisclosed conversation with the judge. The only question is whether or not Mr. Wellons has alleged facts which, if true, would require relief. Mr. Wellons asserts that he has and that consistent with this Court's precedent, both discovery and an evidentiary hearing are warranted.

Without question, contact between the judge and/or bailiff and the jury that denies the defendant twelve impartial jurors is improper and requires reversal of a defendant's

convictions and sentences. *See Parker v. Gladden*, 385 U.S. 363 (1966) (murder conviction reversed due to extraneous influence by bailiff); *Turpin v. Todd*, 519 S.E. 2d 678 (Ga. 1999) (murder conviction reversed due to bailiff's improper communications with jury); *see also Moore v. Knight*, 368 F. 3d 936 (7th Cir. 2004)(*ex parte* communications with judge requires reversal of lower court opinion).

This Court has long recognized that the appropriate remedy when potential juror bias has been asserted is a hearing to permit the defendant the opportunity to prove the bias. *See Remmer v. United States*, 347 U.S. 227 (1954); *Smith v. Phillips*, 455 U.S. 209 (1982). Holding that Petitioner must first prove that there has been extraneous influence on the jurors *before* a hearing can be held makes the requirement of *Remmer* and *Smith* that an evidentiary hearing be held meaningless. To say that the facts supporting the claims of juror misconduct in this case are unique is an understatement. These are not the facts typically alleged in claims of juror misconduct. The Constitution and this Courts precedent require that at a minimum, an evidentiary hearing be granted.

For example, although this Court in *Smith v. Phillips*, 455 U.S. 209 (1982) ultimately denied Phillips' claims of juror impartiality, it was only **after** a hearing had been held to determine whether the juror impartiality had been called into question. *Id.* at 215. In denying, the Court specifically relied upon the fact that a hearing had been held, noting that "[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Id.* In support, the Court cited its holding in *Remmer v. United States*, 347 U.S. 227, 229 (1954), where the Court had found that the proper course when juror misconduct has been alleged is to "determine the circumstances, the impact thereof upon the juror, and whether or not [they were] prejudicial, in a *hearing* with all interested parties permitted to

participate." *Phillips*, 455 U.S. at 216 (emphasis in original).

In *Rushen v. Spain*, 464 U.S. 114 (1983), defense counsel learned of *ex parte* communications between the judge and a juror. When defense counsel learned of the communications and raised the issue with the trial court, the court held a hearing where the juror testified concerning the communications with the trial judge. *Id.* at 116. Only after testimony had been taken from the juror did this Court determine that the error was harmless. The Court noted that an *ex parte* communication with the jury concerning the trial should be disclosed, but found that:

> The prejudicial effect of a failure to do so, however, **can normally be determined by a post-trial hearing**. The adequacy of any remedy is determined solely by its ability to mitigate constitutional error, if any, that has occurred. *See, e.g., United States v. Morrison*, supra, 449 U.S., at 365, 101 S.Ct., at 668; *Rogers v. United States*, supra, 422 U.S., at 40, 95 S.Ct., at 2095. Post-trial hearings are adequately tailored to this task. *See, e.g., Smith v. Phillips*, supra, 455 U.S., at 218-219, and n. 8, 102 S.Ct., at 946-947 and n. 8; *Remmer v. United States*, 347 U.S. 227, 230, 74 S.Ct. 450, 451,98 L.Ed.2d 654 (1954).

Rushen, 464 U.S. at 120 (emphasis added); see, *e.g. U.S. ex. rel. Tobe v. Bensinger*, 492 . 2d 232, 238 (7th Cir. 1974)(new trial granted on allegations of improper communication between bailiff and jurors when trial court did grant sufficient hearing on the allegations).

The Eleventh Circuit relied upon *Rushen* to support a finding that an evidentiary hearing was not warranted in this case. *Wellons*, 554 F. 3d at 937. The teachings of *Rushen* are inconsistent with the Eleventh Circuit's holding. Citing *Rushen*, the Eleventh Circuit noted that "[i]mproper though it may be, the occurrence of an unrecorded ex parte communication between a trial judge and juror, *standing alone*, does not require that a conviction be overturned." (*Id.*, emphasis added). Rather than supporting the holding of the Eleventh Circuit, this finding supports Mr. Wellons' argument that a hearing is

necessary in this case. There is no question that the unrecorded *ex parte* communication does not stand alone in the case. There are at least two *ex parte* communications between the judge and the jury which Mr. Wellons was able to discover before the state habeas court quashed his subpoenas. There are also the gifts of the chocolate penis and breasts to the judge and bailiff and all of the questions concerning how the jurors obtained these gifts and the relationship between the jurors and the judge that made them believe these gifts were appropriate in a capital case and why the court never reported the receipt of these gifts to the attorneys for Mr. Wellons. This is not the scenario referenced by this Court in *Rushen*. The facts, as presently known, have raised more questions than they have answered. The only way to discern what actually happened in this case is to permit discovery and/or an evidentiary hearing.

Unlike the jurors in *Tanner v. United States*, 483 U.S. 107, 127 (1987) who were allegedly intoxicated, a condition that the parties and court could observe, the jurors in Mr. Wellons' case engaged in conduct that was not observable nor reported. Also, unlike the *Tanner* jurors, the jurors in Mr. Wellons' case engaged in conduct that was evidence of extraneous information from outside the jury room as the sequestered jurors managed to somehow acquire the objects and provide them to the court and bailiff without defense counsel ever knowing.

Reliance on Fed. R.Evid. 606 (b) to deny an evidentiary hearing, as the district court did, is in error. Without question, Rule 606 (b) provides strict guidelines concerning the interrogation of jurors following their verdict. But the facts of this case, even the few facts that Mr. Wellons has been able to ascertain without the ability to depose the jurors, do not support an inference that the conduct in this case was the result of internal factors. At best, the gifts were given to the judge and bailiff immediately

following sentencing while the jurors were still at the courthouse. As the jury in this case was sequestered, the gifts had to come from someone outside the jury room. There had to be some conversation between the sequestered jurors and someone outside the jury room to request that the chocolate penis and breasts be delivered to the jury at the courthouse, and this delivery had to be made by someone who was not sequestered. Although substantial policy considerations support the need for Rule 606 (b), the Rule surely was not intended to circumvent a defendant's ability to show that his Constitutional rights to a fair and impartial jury and due process of law were violated by the external factors.

Even when an evidentiary hearing is not mandated by the facts of the case, the district court retains the discretion to hold an evidentiary hearing in every case in which a factual dispute exists. Assuming arguendo that an evidentiary hearing was not mandated in the case, the unique facts required the district court to exercise its discretion and grant the evidentiary hearing. Even the district court recognized this is not just your run of the mill allegations of juror misconduct:

> [T]his Court acknowledges, for the purposes of this discussion, that the jurors' act of sending the judge and bailiff chocolate representations of a penis and/or a woman's breasts constitutes an unusual display of poor taste in the context of a proceeding so grave as a capital trial.

D64-43. The court then found the act of making the gifts "standing alone" does not demonstrate undue bias on the part of the jury or undue influence by the judge. (*Id*.). The district court was incorrect - - this act does not stand alone. As noted above, unlike other cases where relief is denied on claims of juror, judicial or bailiff misconduct, this is not the only act evidencing misconduct. There is also the act of the trial judge going out of her way to enter a room to speak to the jurors, and then failing to report this to defense counsel. Additionally, there is the act of the trial judge openly weeping during the state's

case. There is the fact that neither the trial judge nor the bailiff, who are charged with insuring that no improprieties with the jurors occur, failed to notify trial counsel of **any** of these acts. Finally, there is the fact that a sequestered jury managed to obtain chocolate genitalia from outside the court and to present it to the court.

This Court has long recognized the "qualitative difference" between capital cases and non-capital cases, and the enhanced need for reliability in the determination that death is the appropriate sentence. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). This Court has also consistently recognized the importance that evidentiary hearings play in insuring that capital defendants rights are protected. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 411-12 (1986). Because this is a capital case, and because the facts of the misconduct are pervasive, unique, and were never disclosed to trial counsel, an evidentiary hearing is necessary to determine the scope and nature of the misconduct.

Additionally, to the extent that this behavior by the jury was evidence of racial bias, and Appellant submits that it was, a new trial is warranted. *See Spencer v. Georgia*, 500 U.S. 96 (1991) (improper to utter racial slurs during deliberations); *United States v. Rouse*, 100 F. 3d 560 (8th Cir. 1996) (new trial granted due to racial prejudice in the jury room). At the very least, an evidentiary hearing is warranted to examine the facts. *Tobias v. Smith*, 468 F. Supp. 1287 (W.D.N.Y. 1978).[5] As this Court has found, a death

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[5]These claims of racism must be considered with other issues that have been raised in this case. Both Mr. Wellons and the victim are African-American. During pretrial proceedings in the instant case, issues were raised and litigated concerning racial discrimination in the grand jury and petit jury selection processes in Cobb County, Georgia. Additional issues were litigated concerning racial discrimination in the imposition of the death penalty in Cobb County, Georgia.

During jury selection the District Attorney used his peremptory strikes to remove three of the four prospective African-American jurors from the jury panel. Trial counsel for Mr. Wellons asserted that said challenges were exercised in a racially discriminatory manner. The trial court overruled said objections and Mr. Wellons was tried by a jury

sentenced inmate is entitled to habeas corpus relief under the Fourteenth Amendment if he can show purposeful discrimination by decision-makers in his case, or under the Eighth Amendment, if he can demonstrate a substantial likelihood that racial considerations played a role in the decision to impose a sentence of death rather than one of life. *McCleskey v. Kemp*, 481 U.S. 279, 282 (1987); *see also, Dobbs v. Zant*, 720 F. Supp. 1566, 1572 (N.D. Ga. 1989). Mr. Wellons can do just that.

The lower court denied Mr. Wellons the opportunity to present the necessary evidence on his claims of juror and bailiff misconduct because the courts improperly found the claims to be procedurally barred. As a result of this ruling, Mr. Wellons was denied his rights to a fair trial, impartial and unbiased jurors, judge and bailiff, a trial free of juror and judicial misconduct, and the effective assistance of counsel under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Without the procedural bar, Mr. Wellons is confident that the lower court will permit the requested discovery as discovery of the type requested by Mr. Wellons has been granted in several cases in the Northern District of Georgia. In *Dobbs v. Zant*, the petitioner was permitted to depose and present testimony from the trial jurors, trial judge

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which had only one member who was African-American.

In closing argument, the prosecution referred to Mr. Wellons as a "caged animal" (D5-RX16-P2675). Results of a series of six recent studies published in the Journal of Personality and Social Psychology provide empirical evidence of an "association between Blacks and apes that can operate beneath conscious awareness yet significantly influence perception and judgments." "Not Yet Human: Implicit Knowledge, Historical Dehumanization and Contemporary Consequences," Journal of Personality and Social Psychology,, 2008, Vol. 94, No. 2, 292-306. The article further posits that the bias is exacerbated by the use of language associated with apes. *Id.*

Finally, it is worth noting that the lone African-American juror in the case, Monica Moore, made no mention of the chocolate genitals when interviewed, nor of any juror reunions. (D50-Petitioner's Proffer of Evidence).

and defense attorney on several claims, including the claim that decision to seek and find death in that case had relied impermissibly on the race of the persons involved. *See Dobbs v. Zant*, 720 F. Supp. 1566, 1567-68, 1574 (N.D. Ga. 1989). Likewise, in *Collier v. Turpin*, the petitioner was granted permission to depose and present testimony from the trial jurors in that case on the issue of race and the part it played in their decision-making process.[6] *Collier v. Turpin*, N.D.Ga. 4:91-CV-169-RLV. More recently, in 2002, the Petitioner in *Jefferson v. Head* was permitted to depose the district attorney in the case concerning his decision to seek death in Mr. Jefferson's case and not seek death in the cases of other similarly situated defendants.[7] *Jefferson v. Head*, 1:96-CV-989-CC.

The issue before this Court is whether these claims of misconduct merit full consideration by a habeas court. Whether, after such full consideration, Mr. Wellons prevails on the merits is an issue properly resolved on remand. Mr. Wellons has made every effort to present these claims to the courts and thus is entitled to have his day in court. No court has ever examined how this egregious misconduct by the jurors, judge and bailiff came to occur is a death penalty case. The courts have simply bypassed the issue by misapplying the law.

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[6]Unlike Mr. Wellons, Mr. Collier was permitted to present testimony from the district attorney in the case and the trial judge during state habeas proceedings. Thus, Mr. Collier did not seek leave to depose the trial judge and district attorney in federal court, and instead relied upon their state habeas testimony.

[7]Like Mr. Wellons, Mr. Jefferson was tried and convicted in Cobb County, Georgia. Mr. Jefferson was permitted to depose former district attorney Thomas Charron on the issues noted above. Mr. Wellons is seeking to obtain a copy of Mr. Charron's deposition to determine if the information obtained in the Jefferson case is relevant to his case, and if it is, will present that evidence at the evidentiary hearing in this case or at such time as this Court deems appropriate. Because there are several issues in the case at bar which would not have been covered in the Jefferson deposition, Mr. Wellons still seeks permission to depose Mr. Charron on all of the issues discussed *infra*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. In the alternative, this Mr. Wellons requests that the Court grant, vacate, and remand his case to the Eleventh Circuit with instructions that the claims that have been erroneously procedurally defaulted be considered on the merits.

Dated, this the 3rd day of August, 2009.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 08-___

MARCUS A. WELLONS,
Petitioner,

versus,

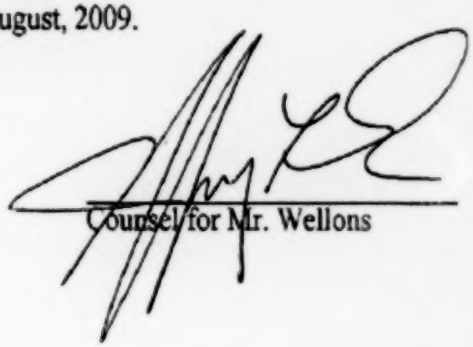
HILTON HALL, Warden,
Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the forgoing pleading upon counsel for Respondent by mail, first class postage prepaid, at the following address:

Beth A. Burton
Senior Asst. Atty. General
40 Capitol Square
Atlanta, Georgia 30334

Dated, this the 3rd day of August, 2009.



Counsel for Mr. Wellons

APPENDIX A

United States Court of Appeals,
Eleventh Circuit.
Marcus **WELLONS**, Petitioner-Appellant,
v.
Hilton HALL, Warden, Georgia Diagnostic and Classification Prison, Respondent-Appellee
No. 07-13086.

Jan. 5, 2009.
As Amended Feb. 5, 2009

Background: Following affirmance of malice murder and rape convictions and imposition of death penalty, 266 Ga. 77, 463 S.E.2d 868, petition for writ of habeas corpus was filed. The United States District Court for the Northern District of Georgia, No. 01-01296-CV-WBH, Willis B. Hunt, Jr., J., denied the petition. Petitioner appealed.

Holdings: The Court of Appeals, Wilson, Circuit Judge, held that:
(1) petitioner's claims of judge, juror, and bailiff misconduct were procedurally barred;
(2) trial court's ruling requiring defendant to disclose names of any experts consulted violated the Due Process Clause of Fourteenth Amendment;
(3) state supreme court's determination that trial court's due process error was harmless error was not contrary to or an unreasonable application of federal law,
(4) defense counsel's investigation of mental illness defense was reasonable trial strategy, and
(5) Georgia's use of three-drug protocol method of execution by lethal injection did not violate the Eighth Amendment

Affirmed

West Headnotes

[1] Habeas Corpus 197 ⇐842

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k842 k. Review De Novo. Most Cited Cases
The Court of Appeals reviews the district court's denial of a petition for writ of habeas corpus *de novo*.

[2] Habeas Corpus 197 ⇐842

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k842 k. Review De Novo. Most Cited Cases

Habeas Corpus 197 ⇐846

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k846 k. Clear Error. Most Cited Cases
When reviewing the denial of a petition for writ of habeas corpus, the Court of Appeals reviews the district court's conclusions of law and mixed questions of law and fact de novo and reviews the district court's findings of fact for clear error.

[3] Habeas Corpus 197 ⇐452

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases

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197k452 k. Federal or Constitutional Questions. Most Cited Cases

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), the scope of "clearly established federal law" includes only those decisions by the United States Supreme Court. 28 U.S.C.A. § 2254(d).

[4] Habeas Corpus 197 ⇐452

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k452 k. Federal or Constitutional Questions. Most Cited Cases

A state court's adjudication is "contrary to" federal law under the Antiterrorism and Effective Death Penalty Act (AEDPA) if it arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. 28 U.S.C.A. § 2254(d).

[5] Habeas Corpus 197 ⇐450.1

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k450.1 k. In General. Most Cited Cases

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a state court's adjudication is an "unreasonable application" of clearly established federal law if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. 28 U.S.C.A. § 2254(d).

[6] Habeas Corpus 197 ⇐450.1

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k450.1 k. In General. Most Cited Cases

To issue a writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act (AEDPA), the state court's application of federal law must be objectively unreasonable; the Court of Appeals cannot grant habeas relief simply because it concludes that the state court applied federal law erroneously or incorrectly. 28 U.S.C.A. § 2254(d).

[7] Habeas Corpus 197 ⇐843

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k843 k. Discretion of Lower Court. Most Cited Cases

The Court of Appeals reviews a federal habeas court's denial of an evidentiary hearing for abuse of discretion.

[8] Habeas Corpus 197 ⇐688

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)1 In General
197k688 k. Discovery and Disclosure, Physical or Mental Examination. Most Cited Cases

A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course.

[9] Habeas Corpus 197 ⇐742

197 Habeas Corpus

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197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)3 Hearing
197k742 k. Discretion and Necessity in General Most Cited Cases
When deciding whether to grant a federal habeas petitioner's request for an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the petitioner to federal habeas relief.

[10] Habeas Corpus 197 ⇐742

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)3 Hearing
197k742 k. Discretion and Necessity in General. Most Cited Cases
Because the Antiterrorism and Effective Death Penalty Act (AEDPA) provides great deference to state-court determinations, a federal court must take into account those standards of review in deciding whether an evidentiary hearing is appropriate

[11] Habeas Corpus 197 ⇐742

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)3 Hearing
197k742 k. Discretion and Necessity in General. Most Cited Cases
If the record refutes the petitioner's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing

[12] Habeas Corpus 197 ⇐422

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)6 State's Reliance on or Waiver of Procedural Bar or Want of Exhaustion
197k422 k. State Court Decision on Procedural Grounds, and Adequacy of Such Independent State Grounds. Most Cited Cases
With due consideration of comity and finality on collateral review of state criminal convictions, federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds

[13] Habeas Corpus 197 ⇐401

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)5 Availability of Remedy Despite Procedural Default or Want of Exhaustion
197k401 k. In General. Most Cited Cases
Under the narrow actual innocence exception to the procedural bar to habeas review, the petitioner must establish by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law

[14] Habeas Corpus 197 ⇐770

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)4 Conclusiveness of Prior Determinations
197k765 State Determinations in Federal Court
197k770 k. Particular Issues and Problems. Most Cited Cases
Petitioner's claims of judge, juror, and bailiff misconduct were procedurally barred from federal habeas review, state supreme court rejected claims on direct appeal as meritless and on state habeas review the claims were not addressed based on conclusion that the state supreme court's decision on

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 08-___

MARCUS A. WELLONS,
Petitioner,

versus,

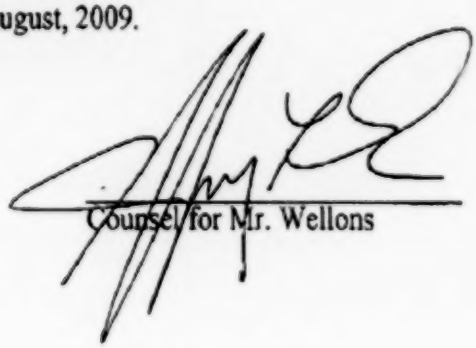
HILTON HALL, Warden,
Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the forgoing pleading upon counsel for Respondent by mail, first class postage prepaid, at the following address:

Beth A. Burton
Senior Asst. Atty. General
40 Capitol Square
Atlanta, Georgia 30334

Dated, this the 3rd day of August, 2009.



Counsel for Mr. Wellons

APPENDIX A

United States Court of Appeals,
Eleventh Circuit.
Marcus WELLONS, Petitioner-Appellant,
v.
Hilton HALL, Warden, Georgia Diagnostic and Classification Prison, Respondent-Appellee.
No. 07-13086.

Jan. 5, 2009.
As Amended Feb. 5, 2009

Background: Following affirmance of malice murder and rape convictions and imposition of death penalty, 266 Ga. 77, 463 S E 2d 868, petition for writ of habeas corpus was filed. The United States District Court for the Northern District of Georgia, No. 01-01296-CV-WBH,Willis B Hunt, Jr , J., denied the petition. Petitioner appealed

Holdings: The Court of Appeals, Wilson, Circuit Judge, held that:
(1) petitioner's claims of judge, juror, and bailiff misconduct were procedurally barred;
(2) trial court's ruling requiring defendant to disclose names of any experts consulted violated the Due Process Clause of Fourteenth Amendment;
(3) state supreme court's determination that trial court's due process error was harmless error was not contrary to or an unreasonable application of federal law;
(4) defense counsel's investigation of mental illness defense was reasonable trial strategy; and
(5) Georgia's use if three-drug protocol method of execution by lethal injection did not violate the Eighth Amendment.

Affirmed.

West Headnotes

[1] Habeas Corpus 197 ⇐842

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k842 k. Review De Novo. Most Cited Cases
The Court of Appeals reviews the district court's denial of a petition for writ of habeas corpus *de novo*.

[2] Habeas Corpus 197 ⇐842

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k842 k. Review De Novo. Most Cited Cases

Habeas Corpus 197 ⇐846

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k846 k. Clear Error. Most Cited Cases
When reviewing the denial of a petition for writ of habeas corpus, the Court of Appeals reviews the district court's conclusions of law and mixed questions of law and fact de novo and reviews the district court's findings of fact for clear error.

[3] Habeas Corpus 197 ⇐452

197 Habeas Corpus
197II Grounds for Relief, Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases

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197k452 k. Federal or Constitutional Questions. Most Cited Cases
Under the Antiterrorism and Effective Death Penalty Act (AEDPA), the scope of "clearly established federal law" includes only those decisions by the United States Supreme Court. 28 U.S.C.A. § 2254(d).

[4] Habeas Corpus 197 ⇐452

197 Habeas Corpus
197II Grounds for Relief, Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k452 k. Federal or Constitutional Questions. Most Cited Cases
A state court's adjudication is "contrary to" federal law under the Antiterrorism and Effective Death Penalty Act (AEDPA) if it arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. 28 U.S.C.A. § 2254(d).

[5] Habeas Corpus 197 ⇐450.1

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k450.1 k. In General. Most Cited Cases
Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a state court's adjudication is an "unreasonable application" of clearly established federal law if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. 28 U.S.C.A. § 2254(d).

[6] Habeas Corpus 197 ⇐450.1

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k450.1 k. In General. Most Cited Cases
To issue a writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act (AEDPA), the state court's application of federal law must be objectively unreasonable; the Court of Appeals cannot grant habeas relief simply because it concludes that the state court applied federal law erroneously or incorrectly. 28 U.S.C.A. § 2254(d).

[7] Habeas Corpus 197 ⇐843

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k843 k. Discretion of Lower Court. Most Cited Cases
The Court of Appeals reviews a federal habeas court's denial of an evidentiary hearing for abuse of discretion.

[8] Habeas Corpus 197 ⇐688

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)1 In General
197k688 k. Discovery and Disclosure, Physical or Mental Examination. Most Cited Cases
A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course.

[9] Habeas Corpus 197 ⇐742

197 Habeas Corpus

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197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)3 Hearing
197k742 k. Discretion and Necessity in General. Most Cited Cases

When deciding whether to grant a federal habeas petitioner's request for an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the petitioner to federal habeas relief.

[10] Habeas Corpus 197 ⇐742

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)3 Hearing
197k742 k. Discretion and Necessity in General. Most Cited Cases

Because the Antiterrorism and Effective Death Penalty Act (AEDPA) provides great deference to state-court determinations, a federal court must take into account those standards of review in deciding whether an evidentiary hearing is appropriate.

[11] Habeas Corpus 197 ⇐742

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)3 Hearing
197k742 k. Discretion and Necessity in General. Most Cited Cases

If the record refutes the petitioner's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.

[12] Habeas Corpus 197 ⇐422

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)6 State's Reliance on or Waiver of Procedural B... or Want of Exhaustion
197k422 k. State Court Decision on Procedural Grounds, and Adequacy of Such Independent State Grounds. Most Cited Cases

With due consideration of comity and finality on collateral review of state criminal convictions, federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds.

[13] Habeas Corpus 197 ⇐401

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)5 Availability of Remedy Despite Procedural Default or Want of Exhaustion
197k401 k. In General. Most Cited Cases

Under the narrow actual innocence exception to the procedural bar to habeas review, the petitioner must establish by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.

[14] Habeas Corpus 197 ⇐770

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)4 Conclusiveness of Prior Determinations
197k765 State Determinations in Federal Court
197k770 k. Particular Issues and Problems. Most Cited Cases

Petitioner's claims of judge, juror, and bailiff misconduct were procedurally barred from federal habeas review, state supreme court rejected claims on direct appeal as meritless and on state habeas review the claims were not addressed based on conclusion that the state supreme court's decision on

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direct review rendered them *res judicata*

[15] Constitutional Law 92 ⇐4600

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4598 Trial in General
92k4600 k. Right to Fair Trial in General. Most Cited Cases

Constitutional Law 92 ⇐4621

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4617 Judges
92k4621 k. Impartiality; Bias and Prejudice. Most Cited Cases
The constitutional minimum established by the Due Process Clause requires that a criminal defendant receive a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case U S C A. Const.Amends 5, 14.

[16] Constitutional Law 92 ⇐4754

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)7 Jury
92k4754 k. Fair and Impartial Jury. Most Cited Cases
Due process ensures the right to an impartial jury and that the fate of a defendant in a capital case not be decided by jurors harboring racial bias against him. U S C.A. Const.Amends 5, 14.

[17] Habeas Corpus 197 ⇐467

197 Habeas Corpus
197II Grounds for Relief, Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k467 k. Courts; Judges, Magistrates, or Officers Most Cited Cases
State court's determination that no judicial bias existed based on gifts given to judge and bailiff by jury following penalty phase of malice murder prosecution was not contrary to or an unreasonable application of federal law, as required for habeas relief; claims of bias were grounded in surmise attached to passive receipt of gifts.

[18] Habeas Corpus 197 ⇐467

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k467 k. Courts; Judges, Magistrates, or Officers Most Cited Cases
State court's determination that trial judge's ex parte conversation with jurors at restaurant did not demonstrate judicial bias was not contrary to or an unreasonable application of federal law, as required for habeas relief, absent any indication that the communication created judicial or juror bias

[19] Criminal Law 110 ⇐864

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k864 k. Communications Between Judge and Jury. Most Cited Cases

Habeas Corpus 197 ⇐467

197 Habeas Corpus
197II Grounds for Relief, Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k467 k. Courts, Judges, Magistrates, or Officers. Most Cited Cases

Habeas Corpus 197 ⇐499

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197 Habeas Corpus
197II Grounds for Relief, Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k499 k. Conduct and Deliberations of Jury. Most Cited Cases
Ex parte communications between the judge and jury are improper and, where they are of serious concern, the prejudice caused by such communications may mandate habeas relief.

[20] Criminal Law 110 ⚖1174(5)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1174 Conduct and Deliberations of Jury
110k1174(5) k. Communications by or with Jurors. Most Cited Cases
The occurrence of an unrecorded ex parte communication between a trial judge and juror, standing alone, does not require that a conviction be overturned.

[21] Constitutional Law 92 ⚖4594(4)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4592 Disclosure and Discovery
92k4594 Evidence
92k4594(2) Particular Items or Information, Disclosure of
92k4594(4) k. Witnesses. Most Cited Cases

Criminal Law 110 ⚖627.6(4)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.6 Information or Things, Disclosure of
110k627.6(4) k. Reports, Memoranda or Notes. Most Cited Cases
Trial court's ruling requiring murder defendant to disclose names, addresses, and written reports of any experts consulted by defense violated the Due Process Clause of Fourteenth Amendment, since it granted the prosecution greater discovery rights than defendant possessed in preparing for trial. U.S.C.A. Const.Amend. 14

[22] Habeas Corpus 197 ⚖447

197 Habeas Corpus
197II Grounds for Relief, Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k447 k. Deprivation of Fundamental or Constitutional Rights; Miscarriage of Justice. Most Cited Cases
On federal habeas, courts must assess the prejudicial impact of constitutional error in a state criminal trial under the substantial-and-injurious-effect standard and not under the harmless-beyond-a-reasonable-doubt standard.

[23] Habeas Corpus 197 ⚖447

197 Habeas Corpus
197II Grounds for Relief, Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k447 k. Deprivation of Fundamental or Constitutional Rights, Miscarriage of Justice. Most Cited Cases
Under the substantial-and-injurious-effect standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice

[24] Habeas Corpus 197 ⚖480

197 Habeas Corpus
197II Grounds for Relief, Illegality of Restraint
197II(B) Particular Defects and Authority for

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Detention in General
197k480 k. Discovery and Disclosure. Most Cited Cases
State supreme court's determination that trial court's due process error in requiring murder defendant to disclose names, addresses, and written reports of any experts consulted was harmless error was not contrary to or an unreasonable application of federal law, as required for habeas relief, where evidence of guilt was overwhelming and defendant had no viable insanity and mental illness defense nor a viable actual innocence defense. U.S.C.A. Const.Amend. 14.

[25] Criminal Law 110 ⟹1912

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1908 Raising of Particular Defense or Contention
110k1912 k. Capacity to Commit Crime; Insanity or Intoxication. Most Cited Cases
Defense counsel's conduct in investigating mental illness defense during capital murder trial was reasonable trial strategy in light of trial court's ruling that defense was required to disclose names of any experts consulted, and therefore was not ineffective assistance. U.S.C.A. Const.Amend. 6.

[26] Criminal Law 110 ⟹1881

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1881 k. Deficient Representation and Prejudice in General. Most Cited Cases
To show ineffective assistance of counsel, a defendant must show (1) that his trial counsel's performance was deficient, and (2) that the deficiency deprived defendant of a fair trial, a trial whose result is reliable. U.S.C.A. Const.Amend. 6.

[27] Criminal Law 110 ⟹1882

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1882 k. Deficient Representation in General. Most Cited Cases
To show deficiency under the first prong of an ineffective assistance of counsel claim, defendant must show that his trial counsel's performance was not reasonable under the circumstances. U.S.C.A. Const.Amend. 6.

[28] Criminal Law 110 ⟹1882

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1882 k. Deficient Representation in General. Most Cited Cases
To show that defense counsel's performance was not reasonable under the circumstances, a convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment, the court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. U.S.C.A. Const.Amend. 6.

[29] Criminal Law 110 ⟹1870

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation

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110XXXI(C)1 In General
110k1870 k. In General. Most Cited Cases

In an ineffective assistance of counsel claim, a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time U.S C.A. Const.Amend 6.

[30] Sentencing and Punishment 350H ⚿1796

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(H) Execution of Sentence of Death
350Hk1796 k Mode of Execution. Most Cited Cases

Georgia's use of three-drug protocol method of execution by lethal injection did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. U S.C A. Const.Amend 8

*926 Mary Elizabeth Wells (Court-Appointed), Atlanta, GA, for Wellons.

Patricia Beth Attaway Burton, State of Ga Law Dept., Atlanta, GA, for Hall.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT, BLACK and WILSON, Circuit Judges.

WILSON, Circuit Judge

Marcus Wellons, an inmate sentenced to death in Georgia for the malice murder and rape of 15-year-old India Roberts, appeals the district court's denial of his petition for a writ of habeas corpus. Wellons raises five issues from his certificate of appealability that we group and address under the following headings: (1) Judge, Juror, and Bailiff Misconduct, (2) *Sabel* Discovery Error, (3) Ineffective Assistance of Counsel, and (4) Constitutionality of Georgia's Death Penalty System. Because neither the Georgia Supreme Court nor habeas court's decisions are contrary to, or an unreasonable application of, clearly established Supreme Court law, we affirm the district court's denial of federal habeas relief

I. BACKGROUND

A *Factual Background*[FN1]

FN1. We draw the facts as summarized by the Supreme Court of Georgia' opinion affirming Wellons's conviction and sentence on direct appeal.

Throughout the summer of 1989, Wellons lived with his girlfriend, Gail Saunders,*927 in her townhouse apartment in Cobb County Early that summer, Saunders' 14-year-old son Tony also lived in the apartment Tony and the victim, who lived in a neighboring apartment with her mother, were friends The victim occasionally visited Tony inside Saunders' apartment, where the two youths would watch television or play Nintendo Wellons encouraged Tony to date the victim, remarking several times that she was a good looking girl At some point during the summer, Tony moved to Chattanooga to live with his grandparents. The victim continued to spend time with Saunders occasionally. Saunders described herself as the victim's "play mommy" with whom the victim shared confidences.

Wellons and Saunders had become acquainted at the hospital where both worked. Wellons as a counselor in the psychiatric ward. Wellons moved in with Saunders on the pretense that he owned a home but was unable to occupy it, because an ex-girlfriend had moved there with her

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two young daughters, and he could not in good conscience turn them out. Over the summer Wellons proposed marriage to Saunders. However, by then Saunders had become wary of Wellons, who was increasingly hostile and abusive. She verbally accepted his proposal out of fear, all the while seeking an escape from her predicament.

On the evening of August 30, 1989, Saunders told Wellons that their relationship was over and that he must move out of her apartment. Wellons, who had recently been fired from his job, purchased a one-way ticket to Miami for a flight departing on the evening of August 31. Fearing to be alone with Wellons the night before his departure, Saunders told Wellons that she was going to Chattanooga to spend the night with her parents and enroll Tony in school. Instead, Saunders went to the home of a female friend.

That evening, Wellons began making desperate attempts to reach Saunders by telephone. He called her mother in Chattanooga repeatedly, only to be told that Saunders had not arrived. Wellons then called Saunders' friends, but no one knew or revealed her whereabouts. He called his mother and told her he suspected that Saunders was with another man. Wellons became increasingly angry and began drinking. He ransacked Saunders' apartment. He overturned potted plants and furniture, threw flour onto the floor, and poured bleach over all of Saunders' clothes, carefully sparing his and Tony's belongings in the process.

After the apartment was demolished, Wellons began attempts to cover up his deed. He broke a window, from the inside out, cutting his hand in the process and smearing blood around the apartment. He stacked electronic equipment by the door. He then called 911 at approximately 3:00 a.m. on August 31 to report a burglary. When a police officer arrived, Wellons told the officer that he had come home to find the apartment ransacked, although no items were missing. Wellons explained to the officer that he cut his hand while struggling to uncover a stash of money to determine if it had been taken. Sometime after the officer left, Wellons wrote a racial slur across the wall in Saunders' bedroom.

Several hours later, at approximately 8:00 a.m., the victim said goodbye to her mother and walked from her apartment, *928 past Saunders' door, toward the school bus stop. Shortly thereafter, Saunders' next door neighbor heard muffled screams from inside Saunders' apartment.

The apartment building was close to a wooded area, beyond which was a grocery store. At approximately 2:00 p.m., Wellons approached an acquaintance who was employed at the grocery store and asked to borrow a car. The acquaintance refused. Wellons told the acquaintance that when he (Wellons) returned home the previous night, he encountered two white men who were burglarizing the apartment. Wellons said that he successfully fought off the intruders but explained that he had in the process sustained the injuries to his hand.

About half an hour later, Theodore Cole, a retired military police officer, was driving near the wooded area behind the apartment complex. He spotted in the distance a person carrying what appeared to be a body wrapped in a sheet. He distinctly saw feet dangling from the bottom of the sheet. Cole drove on but then returned for a second look. He drove around in the parking lot of the apartment complex and saw nothing. As he was driving away, however, he saw a man in his rear view mirror walk along the road and throw a sheet into the woods. Cole drove directly to the grocery store, where he called 911. Police officers arrived quickly and began a search of the woods.

The police first discovered sheets, clothing and

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notebooks bearing Tony's name. Then, upon close inspection of a pile of tree branches near where he had seen the man carrying the sheet, Cole spotted the body of India Roberts When the branches were removed, the officers discovered that the victim was completely unclothed, with cuts on one side of her face and ear and bruises on her neck.

During the search of the woods, Cole spotted a black man with a bundle under his arm near the apartment building and identified him as the man Cole had seen carrying the sheet. Cole and an officer chased the man, but as they approached the building, the man turned the corner and Cole and the officer heard a door shut. The officer learned from a passerby which apartment was occupied by a man fitting the description given by Cole He knocked on Saunders' door and announced his presence, but there was no answer. He returned to join the other officers, who were investigating the scene in full force, with helicopters overhead.

Wellons, now trapped inside Saunders' apartment with residual evidence of his crime, gave up his attempt to dispose of the evidence in the woods He first tried to clean the apartment and his clothes. He then abandoned that project, changed into swim wear, grabbed an old, yellowed newspaper and a cup of wine, partially barricaded and locked the door, and headed for the pool. On his way, Wellons caught sight of a police officer and stopped abruptly. The officer began questioning him Initially evasive, Wellons did ultimately tell officers that the injuries to his hand, and new scratches to his face, were sustained during a scuffle with two men whom he had caught burglarizing Saunders' apartment.

While investigating the scene, officers had asked Cole whether either of two black males was the man Cole had seen carrying the sheet. Cole immediately ruled out each of the men. Then, while officers were questioning Wellons, one officer standing at a distance from the questioning asked Cole whether Wellons *929 was the man he had seen. Cole said that although Wellons was wearing different clothing from the man he had seen carrying the sheet, and whom he had again seen near the complex, Cole was 75 to 80 percent certain that Wellons was the same man.

Later that day, officers searched Saunders' apartment. Inside, they found numerous items of evidence including the victim's notebooks and earrings. In Tony's room, they discovered the victim's panties They also found blood on Tony's mattress and box springs. The mattress had been flipped so that the bloody portion was facing downward, and the bed had been remade.

The autopsy revealed that the victim died from manual strangulation, which in itself would have taken several minutes The autopsy also showed that Wellons had attempted to strangle the victim with a ligature, possibly a telephone cord, and that he had bruised her and cut her face and ear with a sharp object The evidence suggested that Wellons had dragged or otherwise forcibly moved the victim from the kitchen up the stairs to Tony's bedroom. Finally, the autopsy revealed a vaginal tear and copious amounts of what appeared to be seminal fluid within the victim's vagina. She had defensive wounds to her hands, and her blouse was stained with her own blood

Wellons v State, 266 Ga. 77, 463 S.E.2d 868, 873-75 (1995).

B *Procedural History*

1. *Trial and Sentencing Phases*

Wellons was charged with the malice murder and rape of India Roberts Wellons did not dispute his participation in the crimes, but pleaded not guilty by reason of insanity or guilty but mentally ill. During pre-trial proceedings, the state moved for the

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disclosure of the identities, addresses, and written reports of any experts consulted by defense counsel, arguing that under *Sabel v State*, 248 Ga. 10, 282 S E 2d 61 (1981), the prosecution was entitled to full discovery from these experts whether or not the defense intended to have them testify at trial. The defense argued that such disclosure would effectively chill Wellons's consultation with mental health experts and impede defense efforts to prepare for both the guilt and penalty phases of trial, in violation of Wellons's federal constitutional rights to due process and the effective assistance of counsel. Over the defense's forceful objections, the court ruled in favor of the state and ordered the defense to disclose the names, addresses, and written reports of any experts consulted.

Wellons moved for interim review, arguing that the discovery violated due process because it granted the prosecution broader discovery rights against Wellons than he had against the state. Wellons explained that the *Sabel* ruling prevented defense counsel from consulting with experts to understand the scientific matters involved with his defense, decide what further lines of investigation to pursue as necessary, discern which defenses or theories and theories were viable, and assist in the cross-examination and rebuttal of the state's medical experts. The defense also argued that while Wellons needed to speak candidly with mental health experts during his examination, such unreserved disclosure to the experts may compromise Wellons's privilege against self-incrimination in light of the *Sabel* ruling.[FN2] The court *930 rejected these arguments and denied the request for interim review.

> FN2. Dr. Bary Scanlon, an expert psychiatrist consulted by the defense, submitted an ex parte affidavit in support of defense motions against the *Sabel* order explaining that he was unable to render an official opinion as to Wellons's mental state because Wellons would not discuss the facts and circumstances surrounding the crime during the interview.

Nine days before jury selection, the defense requested the court to clarify its *Sabel* order. The defense had consulted three experts, none of whom had yet written reports. The defense contended that any reports that would be prepared should be exempt from the court's *Sabel* ruling because they are not "scientific" reports under *Caldwell v State*, 260 Ga. 278, 393 S.E.2d 436 (1990).[FN3] The court ruled that any reports from the three experts-a psychiatrist, psychologist, and sociologist-would be scientific reports and must be disclosed to the prosecution pursuant to the *Sabel* order. After the court denied Wellons's motion to reconsider, defense counsel disclosed the identities of the mental health experts consulted. To avoid any further disclosures, however, defense counsel refrained from having the experts prepare any written reports.

> FN3. In holding that DNA identification evidence is admissible in a criminal trial, the Georgia Supreme Court reaffirmed that the test for the admissibility of "scientific" evidence is " 'whether the procedure or technique in question has reached a scientific stage of verifiable certainty.' " *Caldwell*, 393 S.E.2d at 441 (quoting *Harper v State*, 249 Ga. 519, 292 S.E.2d 389, 395 (1982)).

In light of the *Sabel* rulings, Wellons's counsel decided not to present any mental health expert testimony during the guilt phase of trial. On June 6, 1993, a jury convicted Wellons of malice murder and rape.

During the penalty phase, Wellons presented seventeen mitigation witnesses, including an expert sociologist and an expert psychologist. The lay witnesses-especially members of Wellons's immediate family-testified about the physical abuse Wellons suffered at the hands of his father and about Wellons's history of substance abuse. Dr. Marti Loring,

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the expert sociologist, wrote a report for the penalty phase and testified about the typical effects of child abuse and the impact Wellons's history of abuse may have had on him. Dr Steven O'Hagen, the expert psychologist, testified on the basis of Dr. Loring's written report and his own interview with Wellons-that Wellons suffers from post-traumatic stress disorder, a mixed personality disorder, and substance abuse, but does not suffer from brain damage and is not psychotic. Dr. O'Hagen acknowledged the court-appointed psychiatrist's conclusions that Wellons is an intelligent, well-educated man with a significant personality disorder but who suffers neither pyschosis nor brain damage On cross-examination, Dr. O'Hagen admitted that at defense counsel's request, he did not put his findings and conclusions in writing The prosecution made this admission the center of its impeachment of Dr. O'Hagen's testimony, dubbing Dr. O'Hagen's conclusions "mystery findings "

On June 8, 1993, Wellons was sentenced to death for the murder of India Roberts, the jury having found as statutory aggravating circumstances that the murder was wantonly vile and horrible and involved torture and depravity of mind. Wellons received a sentence of life imprisonment for the rape conviction.

During their post-trial interviews of the jurors, defense counsel learned that either during or immediately following the penalty phase, some jury members gave the trial judge chocolate shaped as male genitalia and the bailiff chocolate shaped as female breasts Defense counsel also learned that while the jurors were eating *931 dinner at a local restaurant in a room separated from other diners, the judge entered their room and spoke to them. Immediately upon learning this information, Wellons's counsel moved for a new trial and to recuse the trial judge. The court denied both motions

2. *Direct Appeal and State Habeas Proceedings*

Among the thirty-five claims Wellons raised on direct appeal before the Georgia Supreme Court, he argued that. (1) the trial court's *Sabel* ruling prevented him from effectively presenting his insanity defense at the guilt and penalty phases of trial by chilling his consultation with mental health experts; (2) the trial judge should have recused because she and the bailiffs allegedly had improper communications with the jurors; (3) that Georgia's death penalty scheme violates the Equal Protection Clause because unfettered prosecutorial discretion results in its disproportionate administration, and (4) that the method of execution (at that time by electrocution) violates the Eighth Amendment as cruel and unusual punishment Central among these was Wellons's *Sabel* claim-that the ruling rendered his trial fundamentally unfair because his counsel, faced with the Hobson's choice of granting the state full access into the defense's mental health investigation and case theory by consulting mental health experts, was compelled to forgo the expert testimony needed to support Wellons's defense.

The Georgia Supreme Court concluded that Wellons's judicial disqualification and death penalty arguments lacked merit *Wellons*, 463 S E.2d at 880-82. On the first claim, however, the court acknowledged that under *Rower v. State*, 264 Ga. 323, 443 S E 2d 839 (1994), the trial court's *Sabel* ruling was erroneous *Wellons*, 463 S E 2d at 875-76 In *Rower*, decided after Wellons's trial but during his direct appeals, the Georgia Supreme Court overruled *Sabel*, holding that the state is entitled to receive only those scientific reports that the defense intends to use at trial, and not-as *Sabel* required-the reports of any experts consulted by the defense in preparation for trial. *Rower*, 443 S E.2d at 841-42. In so holding, the court reasoned that *Sabel*'s disclosure mandate did not provide reciprocal discovery rights, but rather granted the state greater discovery rights than the statutory discovery rights provided the defendant. *Id* at 842. Because the discovery system under *Sabel* did not ensure " 'a bal-

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ance of forces between the accused and his accuser,' " the Georgia Supreme Court overruled *Sabel* as a violation of a criminal defendant's right to due process. *Id.* (quoting *Wardius v Oregon*, 412 U.S. 470, 474, 93 S.Ct. 2208, 2212, 37 L.Ed 2d 82 (1973)).

Although the Georgia Supreme Court found that the *Sabel* ruling was erroneous, *Wellons*, 463 S.E.2d at 876, it concluded that the error was harmless because Wellons did not disclose any expert reports *Id* The court found no prejudice from counsel's decision not to present any mental health expert testimony during the guilt phase because "the evidence as a whole demonstrate[d] that his defenses of insanity and mental illness were simply not viable." *Id.* The Georgia Supreme Court also determined that the *Sabel* ruling did not prejudice Wellons during the penalty phase because he presented seventeen mitigation witnesses, including a sociologist and psychologist, who testified to Wellons's abusive family history and psychological state. *Id.* Ultimately, the Georgia Supreme Court was not persuaded by the "chilling effect" that Wellons argued denied him due process or the effective assistance of counsel. In affirming Wellons's conviction and sentence, the court observed that

> *932 the error, though it might well have initially had a chilling effect on consultation with experts, was ultimately harmless The chilling effect could have been and apparently was cured after Wellons decided to raise the insanity defense. His counsel made an intelligent, strategic choice not to contest Wellons' participation in the crimes, to merely introduce the idea of mental illness in the guilt-innocence phase of trial, and then to bring every effort to bear in mitigation.

Id. at 876-77 The United States Supreme Court denied Wellons's petition for writ of certiorari. *Wellons v. Georgia*, 519 U.S. 830, 117 S.Ct. 97, 136 L.Ed 2d 52 (1996).

Wellons subsequently petitioned the Superior Court of Butts County for state habeas relief He attacked his conviction and sentence on the grounds that, among other things, the *Sabel* ruling created a structural defect depriving him of due process (Ground One) and denied him the effective assistance of trial counsel (Ground Six). Wellons also argued that certain incidents of judge, juror, and bailiff misconduct denied him a fair and impartial trial (Grounds Two-Four); that his trial and appellate counsel were constitutionally ineffective in the overall manner in which they investigated and advocated his case (Ground Seven), and that the Georgia death penalty procedure is unconstitutional both facially and as applied to him (Ground Sixteen)

The state habeas court conducted an evidentiary hearing, noting at the outset that the due process and ineffectiveness claims related to the *Sabel* ruling would be central to its analysis The court further limited the scope of the hearing by denying Wellons's request to present evidence on his claims of judge, juror, and bailiff misconduct. It determined that those claims were precluded from state habeas review because the Georgia Supreme Court's decision on direct appeal rendered them "res judicata "

At the hearing, Derek Jones, Wellons's lead counsel during the trial and direct appeals, testified that he believed the *Sabel* rulings placed him in a position where he was unable to fully and adequately advocate Wellons's mental health defenses in both the guilt and penalty phases of trial He explained that based on his experience trying capital cases such as Wellons's, where the defenses of insanity and mental illness have been pled, counsel's consultation with mental health experts is critical to the defense, irrespective of whether the experts eventually testify According to Jones, these experts could have helped him decide what defenses and lines of investigation to pursue and whether the chosen defenses were viable Because the *Sabel* ruling would

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have required full disclosure of this information to the state, however, Jones explained that he felt compelled to forgo the full psychological and psychiatric consultation he would have otherwise pursued to best defend his client's case

In its final order, the Superior Court of Butts County determined that nearly all of Wellons's claims were barred from habeas review, either because they were res judicata or procedurally defaulted. The only claim to survive both procedural bars was Wellons's claim that the *Sabel* ruling rendered his trial and appellate counsel ineffective. Reviewing that claim under *Strickland v Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the state habeas court found that Jones ardently contested the *Sabel* ruling, yet when it became clear that the ruling would be the law of the case, Jones was "forced to make a determination as to whether to use experts and risk providing key evidence for the State that it would not have *933 otherwise had, or to not use experts at all." Res. Exh. 64 at 26. Under these circumstances, Jones's decision to present no mental health expert evidence during the guilt innocence phase was not deficient, but rather an informed, tactical decision.

The state habeas court also found that despite the *Sabel* ruling, defense counsel was able to have Dr. O'Hagen conduct psychological tests and officially diagnose Wellons in preparation to testify at the penalty phase In all, trial counsel's performance was consistent with the actions of a reasonable attorney under similar circumstances. Finding no deficiency in trial counsel's performance, the court concluded that Wellons was not entitled to habeas relief.[FN4] On January 9, 2001, the Georgia Supreme Court denied Wellons's application for a certificate of probable cause to appeal; it denied his motion for reconsideration on April 13, 2001.

FN4. Even though it had denied Wellons's ineffectiveness claim on *Strickland*'s deficient-performance prong, the state habeas court nonetheless proceeded to examine the claim under *Strickland*'s second prong assuming, arguendo, Jones's performance was deficient As to the second *Strickland* prong, the court agreed with the Georgia Supreme Court and found that Wellons was not prejudiced by the absence of expert testimony during the guilt phase of trial because his mental health defenses were not viable

3 *Federal Habeas Proceedings*

Wellons filed his first petition for writ of federal habeas corpus on May 18, 2001, and an amended petition on March 19, 2004. Along with his petition, Wellons sought leave to conduct discovery on the judge, juror, and bailiff misconduct claims, as well as authorization and payment for expert examinations. In a series of orders, the district court first concluded that Wellons's claims of judge, juror, and bailiff misconduct were procedurally barred, and accordingly denied his motion for an evidentiary hearing on these claims. The court later vacated that ruling with respect to the bailiff misconduct claim, but nonetheless denied that claim on the merits. The court also denied Wellons's request for an evidentiary hearing on his method of execution claim. In its final order, the district court concluded that Wellons's remaining claims-regarding the *Sabel* ruling, ineffective assistance of counsel caused by the *Sabel* ruling, and method of execution-did not entitle him to federal habeas relief, and it denied Wellons's petition on the merits

Wellons appeals the district court's denial of his habeas petition. The district court also granted a certificate of appealability as to its orders denying Wellons's application for an evidentiary hearing and discovery on his judge, juror, and bailiff misconduct claims and his method of execution claim

II. FEDERAL HABEAS CORPUS STANDARD

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OF REVIEW

[1][2] We review the district court's denial of a petition for writ of habeas corpus *de novo Jamerson v Sec'y for Dep't of Corr.*; 410 F.3d 682, 687 (11th Cir 2005). Likewise, we review the district court's conclusions of law and mixed questions of law and fact *de novo Parker v Head*, 244 F.3d 831, 836 (11th Cir 2001). We review the district court's findings of fact for clear error. *Id*

[3] Because Wellons timely filed his first petition for federal habeas corpus relief on May 18, 2001, and is in state custody, his application for habeas relief is governed by 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996) AEDPA establishes a " 'highly deferential standard*934 for reviewing state court judgments.' " *Jamerson*, 410 F 3d at 687 (quoting *Parker v. Sec'y for Dep't of Corr*, 331 F.3d 764, 768 (11th Cir.2003)) Thus, pursuant to § 2254(d), we have the authority to grant a writ of habeas corpus with respect to claims "adjudicated on the merits in State court proceedings" only when the State court's adjudication of those claims

> resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or ... resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding

28 U S C § 2254(d) The text of § 2254(d) outlines the scope of "clearly established Federal law" to include only those decisions by the United States Supreme Court *Id* In *Williams v Taylor*, 529 U.S 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), the Supreme Court interpreted § 2254(d) to limit federal habeas analysis to the Court's holdings, not dicta, as of the time the state court adjudicated the petitioner's claims. *Id* at 412, 120 S Ct. at 1523 (opinion of O'Connor, J).

[4][5][6] A state court's adjudication is "contrary to" federal law if it "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Id* at 413, 120 S Ct at 1523 On the other hand, a state court's adjudication is "an unreasonable application of" clearly established federal law if the state court "identifies the correct governing legal principle from th[e] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* To issue the writ in either case, the state court's application of federal law must be objectively unreasonable; we cannot grant habeas relief simply because we conclude that the state court applied federal law erroneously or incorrectly *Id.* at 411, 120 S Ct at 1522, *see also Woodford v Visciotti*, 537 U.S. 19, 27, 123 S.Ct 357, 361, 154 L.Ed.2d 279 (2002) (per curiam) ("The federal habeas scheme leaves primary responsibility with the state courts for these judgments[ ] and authorizes federal-court intervention only when a state-court decision is objectively unreasonable.")

In reviewing whether a state court's decision was based on an "unreasonable determination of the facts" under § 2254(d)(2), we presume the state court's factual findings are correct absent the petitioner's showing of clear and convincing evidence to the contrary 28 U S C. § 2254(e)(1); *see also Miller-El v Cockrell*, 537 U S 322, 340, 123 S.Ct 1029, 1041, 154 L.Ed.2d 931 (2003); *Parker v. Head*, 244 F.3d at 835-36. This statutory presumption of correctness applies to the factual determinations of both state trial and appellate courts *Bui v Haley*, 321 F 3d 1304, 1312 (11th Cir 2003) It does not apply, however, to state-court determinations on mixed questions of law and fact, which we review *de novo Parker*, 244 F 3d at 836.

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[7] Finally, we review a federal habeas court's denial of an evidentiary hearing for abuse of discretion *Schriro v Landrigan*, 550 U S 465, 127 S Ct 1933, 1939, 167 L Ed.2d 836 (2007). With these standards of review in mind, we now turn to Wellons's claims

III. DISCUSSION

A *Judge, Juror, and Bailiff Misconduct*

On appeal, Wellons contends that the jurors' chocolate "gifts" to the judge and *935 bailiff and the judge's conversation with jurors at the restaurant are prima facie evidence of an inappropriate relationship between the judge, jurors and bailiff, that if he were allowed to prove at a hearing, would entitle him to habeas relief He argues that the district court erred in denying his motions for discovery and an evidentiary hearing to develop his judge, juror, and bailiff misconduct claims because they are not procedurally barred.[FN5]

FN5 Wellons further disputes the application of § 2254(e)(2)'s bar to his request for a hearing. Section 2254(e)(2) provides a federal habeas court shall not hold an evidentiary hearing on a claim for which the petitioner fails to develop the factual basis unless he can show that (A) the claim relies on (i) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court"; or (ii) "a factual predicate that could not have been previously discovered through the exercise of due diligence"; and (B) "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2) While the district court referenced § 2254(e)(2) in its discussion on the issue, its denial of Wellons's motion did not rest on § 2254(e)(2)'s bar, but rather on Wellons's failure to demonstrate "cause and prejudice" or "actual innocence" to permit review of the procedurally barred claims

[8] "A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U S 899, 904, 117 S Ct 1793, 1796-97, 138 L Ed 2d 97 (1997) Thus, while the Federal Rules of Civil Procedure do not apply in federal habeas, the Supreme Court has fashioned certain discovery rules for habeas pursuant to its authority under the All Writs Act, 28 U.S.C. § 1651. *Bracy*, 520 U S at 904, 117 S.Ct. at 1797 The most pertinent rule provides:

> A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise

Rule 6(a), Rules Governing § 2254 Cases (quoted in *Bracy*, 520 U.S at 904, 117 S.Ct. at 1797).

[9][10][11] When deciding whether to grant a federal habeas petitioner's request for an evidentiary hearing, "a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Landrigan*, 127 S Ct at 1940. Because AEDPA provides great deference to state-court determinations, "a federal court must take into account those standards [of review] in deciding whether an evidentiary hearing is appropriate." *Id.* "It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id*

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[12][13] Wellons was not entitled to discovery or an evidentiary hearing because the record reveals that his claims of judge, juror, and bailiff misconduct are procedurally barred from federal habeas review. With due consideration of comity and finality on collateral review of state criminal convictions, "federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds." *Dretke v. Haley*, 541 U.S. 386, 392, 124 S.Ct. 1847, 1852, 158 L.Ed.2d 659 (2004); *see also Wainwright v. Sykes*, 433 U.S. 72, 86-87, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594 (1977). Because principles of fundamental fairness rest at the core of the writ of habeas corpus, the Court has "recognized an equitable exception*936 to the bar when a habeas applicant can demonstrate cause and prejudice for the procedural default." *Haley*, 541 U.S. at 393, 124 S.Ct. at 1852. And, to guard against a fundamental miscarriage of justice, a petitioner may still be entitled to habeas absent a showing of cause and prejudice if he is actually innocent. *Id.* Under this narrow "actual innocence" exception, the petitioner must establish " 'by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.' " *Id.* (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336, 112 S.Ct. 2514, 2517, 120 L.Ed.2d 269 (1992))

[14] When Wellons first learned of the chocolate "gifts" and the judge's conversation with jurors at the restaurant during defense counsel's post-trial interviews of the jurors, Wellons immediately moved for a new trial and to recuse the trial judge, who denied both motions. Wellons later raised the claims on direct appeal, and the Georgia Supreme Court rejected these claims as meritless. *See Wellons*, 463 S.E.2d at 880. On state habeas review, the Superior Court of Butts County did not address these claims, concluding that the Georgia Supreme Court's decision on direct review rendered them res judicata. As the state habeas court's ruling regarding these claims rests on an adequate and independent state procedural ground, the district court correctly found these claims procedurally barred from federal habeas review.[FN6]

> FN6. Contrary to Wellons's argument, whether the state habeas court properly concluded that these claims were barred pursuant to Georgia's procedural default rules or the state's doctrine of *res judicata* is irrelevant to our procedural default analysis. Under either scenario, the state habeas court's ruling rested on independent and adequate procedural grounds.

Nevertheless, the district court allowed Wellons, in another round of briefing, to respond to the procedural bar with a showing of cause and prejudice. Wellons never presented such arguments. Because Wellons has demonstrated neither "cause and prejudice" nor "actual innocence" to overcome the procedural bar, his claims of judge, juror, and bailiff misconduct were not properly before the district court. We therefore conclude that the district court did not abuse its discretion in denying Wellons's requests for discovery or an evidentiary hearing on these procedurally barred claims.

[15][16] Even if we assume that Wellons's misconduct claims are not procedurally barred, they do not entitle Wellons to habeas relief. The constitutional minimum established by the Due Process Clause requires that a criminal defendant receive a "fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy*, 520 U.S. at 904-05, 117 S.Ct. at 1797 (internal quotation marks and citation omitted). Due process also ensures the right to an impartial jury and that the fate of a defendant in a capital case not be decided by jurors harboring racial bias against him. *Morgan v. Illinois*, 504 U.S. 719, 729-31, 112 S.Ct. 2222, 2230, 119 L.Ed.2d 492 (1992).

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[17] Wellons's alleged evidence of the jury's racial bias against him is grounded in his speculation as to the meaning underlying the jurors' chocolate "gifts" to the judge and bailiff. Wellons's claims of bias by the judge and bailiff are also grounded in the surmise attached to their passive receipt of these gifts. The Georgia Supreme Court reviewed Wellons's claims under Uniform Superior Court Rule 25.1, which requires a trial judge presented with *937 a motion to recuse to "determine whether, assuming the truth of any of the facts alleged, a reasonable person might conclude that the judge harbors a bias, stemming from an extra-judicial source, which is of such a nature and intensity that it would impede the exercise of impartial judgment" *Wellons*, 463 S.E.2d at 880. After examining Wellons's supporting affidavits, the Georgia court concluded that, assuming that Wellons's allegations regarding the gifts and the trial judge's communication with the jurors in a restaurant were true, there was no basis for finding that judicial bias existed. In light of the evidence presented before the Georgia Supreme Court, its determination is not based on an unreasonable determination of the facts.

[18][19][20] The other misconduct claim stems from the trial judge's ex parte conversation with the jurors at the restaurant, which the judge never recounted on the record. Ex parte communications between the judge and jury are improper and, where they are of serious concern, the prejudice caused by such communications may mandate habeas relief *See Rushen v. Spain*, 464 U.S. 114, 119, 104 S.Ct. 453, 456, 78 L.Ed.2d 267 (1983) (per curiam). Improper though it may be, the occurrence of an unrecorded ex parte communication between a trial judge and juror, standing alone, does not require that a conviction be overturned *See id.* at 117-18, 104 S.Ct. at 455 (explaining that the deprivation of a criminal defendant's right to personal presence at all critical stages is subject to harmless error analysis and stating, "the Constitution does not require a new trial every time a juror has been placed in a potentially compromising situation" (internal quotation marks omitted))

As the Supreme Court has recognized, the day-to-day realities of courtroom life make it "virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Id.* at 118, 104 S.Ct. at 456 (internal quotation marks omitted). With respect to judge-juror contact, "[t]here is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial." *Id.*, 104 S.Ct. at 455-56. Generally, if the communication relates to some aspect of the trial, the judge should disclose it to counsel for all parties, and-especially in the context of a murder trial-she should do so on the record. *See id.* at 119, 104 S.Ct. at 456. In this case, Wellons argues that the judge's failure to disclose the communication perpetuated a veil of secrecy over the jurors' bias against him. Any prejudice caused by a judge's failure to make this disclosure "can normally be determined by a post-trial hearing[,] [t]he adequacy of any remedy is determined solely by its ability to mitigate constitutional error, if any, that has occurred." *Id.* at 119-20, 104 S.Ct. at 455. While there was no immediate post-trial hearing in this case that recounted the factual basis of the claim, the issues related to the judge's ex parte communication and the jurors' alleged bias were heard by the Georgia Supreme Court, which found no basis for concluding judicial bias existed. *Wellons*, 463 S.E.2d at 880. The Georgia Supreme Court's judgment as to the substance and effect of the ex parte communication is a finding of fact to which we apply a presumption of correctness and may overturn "only if it lacks even fair support in the record." *Spain*, 464 U.S. at 120, 104 S.Ct. at 456 (internal quotation marks and alteration omitted). There is no indication in the record that the communication created judicial or juror bias so as to deprive Wellons of a fair trial. Thus, even if these claims were properly

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before us on habeas review, we would not disturb *938 the Georgia Supreme Court's conclusion on the merits of these claims

B *Sabel Claim*

Wellons argues that the trial court's *Sabel* ruling violated his due process right to present his insanity and mentally ill defenses. He claims that the ruling amounted to constitutional error under *Wardius* v. *Oregon*, 412 U.S. 470, 93 S.Ct 2208, 37 L.Ed 2d 82 (1973), and argues that this error is not harmless because the risk of full disclosure to the prosecution chilled his investigation and consultation with mental health experts, which were critical to his defense

In *Wardius*, the Supreme Court addressed the constitutionality of an Oregon trial court's ruling that prevented a criminal defendant from presenting any alibi evidence as a sanction for the defense's failure to comply with the state's notice-of-alibi discovery rule that did not provide for reciprocal discovery 412 U.S. at 471-72, 93 S Ct. at 2210-11 Although the Court had previously upheld the constitutionality of notice-of-alibi rules as a general matter, *see Williams v Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L Ed 2d 446 (1970), the Court "emphasized that the constitutionality of such rules might depend on 'whether the defendant enjoys reciprocal discovery against the State,' " *Wardius*, 412 U.S. at 471, 93 S Ct at 2210 (quoting *Williams*, 399 U S. at 82 n 11, 90 S Ct. at 1896 n 11) Deciding the issue left open in *Williams*, the Supreme Court held that notice-of-alibi rules that do not provide for reciprocal discovery rights between the defendant and the prosecution violate the Due Process Clause of the Fourteenth Amendment *Wardius*, 412 U S at 472, 93 S.Ct. at 2211 The Oregon notice-of-alibi rule at issue granted no discovery rights to the defendant, with the possible exception of allowing the defendant to view written statements by the defendant and state witnesses in police possession *id* at 475 & n 8, 93 S Ct. at 2212 & n. 8. Consequently, the Court struck down the Oregon rule, "hold[ing] that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses." *Id* at 475, 93 S Ct. at 2212. The Court made clear that while the Due Process Clause does not reach so far as to prescribe specific discovery rules in a criminal trial, "[i]t is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State " *Id* at 476, 93 S Ct at 2212-13

In this case, the trial court maintained that pursuant to *Sabel*, the defense must disclose the identities and reports of any mental health experts consulted regardless of whether they would testify at trial. While Wellons's direct appeals were pending, however, the Georgia Supreme Court overruled *Sabel*, holding that the prosecution is only entitled to discover those scientific reports by expert witnesses that the defense intends to call at trial *Rower*, 443 S.E.2d at 842. The Georgia Supreme Court reasoned that while the Due Process Clause does not prevent a state from implementing broad discovery systems in criminal cases so long as there is a "balance of forces" between the state and the defendant, "the discovery rights granted to the state under *Sabel* are not reciprocal, but are, in fact, greater than the statutory discovery rights granted to the defendant by O C G A. § 17-7-211." *Rower*, 443 S E 2d at 842 (quoting *Wardius*, 412 U S at 474, 93 S Ct at 2211-12) Because *Rower* was decided on interim review, *939 however, the Georgia Supreme Court had no occasion to address the prejudicial effect, if any, caused by the trial court's *Sabel* ruling

The Georgia Supreme Court addressed that issue in *Wellons*, 266 Ga. 77, 463 S E 2d 868. After con-

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cluding that *Rower* applied retroactively to Wellons's appeal because it was "in the pipeline" when *Rower* was decided, the court applied harmless-error analysis to Wellons's *Sabel* chilling effect claim. *Id.* at 876. The Georgia Supreme Court found that although the trial court's ruling was erroneous under *Rower*, that error was nonetheless harmless because Wellons did not make any expert disclosures. *Id.*

[21] *Wardius* and *Rower* make clear that the trial court's *Sabel* ruling in Wellons's case violated the Due Process Clause of Fourteenth Amendment because it granted the prosecution greater discovery rights than Wellons possessed in preparing for trial.[FN7] The main question is whether the constitutional error in the *Sabel* ruling was harmless error.[FN8]

> FN7. In fact, as soon as the defense disclosed the identities of the experts they consulted, the prosecution subpoenaed these witnesses, arguing under *Sabel* that if the defense did not call these witnesses, the state may elect to do so.
>
> FN8. In his initial brief, Wellons argued that harmless-error analysis is inapplicable to his case because the *Sabel* ruling was not "trial-type" error, but rather a "structural defect" in his trial as it "completely precluded him from presenting his defense to the jury." Brief for Appellant at 40-41. During oral argument, however, Wellons abandoned this argument by conceding that harmless-error was the appropriate framework. Therefore, we only address whether the Georgia Supreme Court's decision that the *Sabel* error was harmless is contrary to, or an unreasonable application of, clearly established federal law.

The Supreme Court has declined to adopt a rule that all federal constitutional errors committed during the course of a criminal trial require reversal of subsequent convictions. *Chapman v. California*, 386 U.S. 18, 21-22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967). In *Chapman*, the Court explained that it has long been the rule in both state and federal court that "judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.' " *Id.* at 22, 87 S.Ct. at 827 (quoting 28 U.S.C. § 2111).

[22][23] In deciding whether the trial court's *Sabel* ruling constituted harmless or reversible error, we must examine the ruling in the context of Wellons's trial to assess the extent of any prejudicial effect. In *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), the Supreme Court held that on federal habeas, courts must assess the prejudicial impact of constitutional error in a state criminal trial under the "substantial-and-injurious-effect" standard and not under *Chapman*'s "harmless-beyond-a-reasonable-doubt standard." *Id.* at 622, 113 S.Ct. at 1713-14. The history behind the great writ verifies habeas relief as an extraordinary remedy that serves as "a bulwark against convictions that violate fundamental fairness." *Id.* at 633-34, 113 S.Ct. at 1719 (internal quotation marks omitted). Because the writ is targeted to prevent a fundamental miscarriage of justice, "an error that may justify reversal on direct appeal [as in *Chapman*] will not necessarily support a collateral attack on a final judgment." *Id.* at 634, 113 S.Ct. at 1720 (internal quotation marks omitted). Under *Brecht*'s "substantial-and-injurious-effect" standard, "habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to *940 habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.' " *Id.* at 637, 113 S.Ct. at 1722.

Although *Brecht* was decided before Congress's enactment of AEDPA in 1996, the Supreme Court re-

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cently confirmed the application of *Brecht*'s more deferential "substantial-and-injurious-effect" standard when assessing the prejudicial impact of constitutional error on federal habeas review. *Fry v Pliler*, 551 U.S. 112, 127 S.Ct 2321, 168 L.Ed.2d 16 (2007). In *Fry*, the Court rejected the petitioner's argument that AEDPA replaced *Brecht*'s standard for reviewing constitutional error because AEDPA was designed to further limit the availability of habeas relief. *Id.* at 2327 Therefore, the Court deemed it "implausible that, without saying so, AEDPA replaced the *Brecht* standard of 'actual prejudice' with the more liberal AEDPA/ *Chapman* standard which requires only that the state court's harmless-beyond-a-reasonable-doubt determination be *unreasonable*" *Id.* (emphasis added) (internal quotation marks and citation omitted)

The *Fry* Court also rejected the argument that its holding in *Mitchell v. Esparza*, 540 U S. 12, 124 S Ct 7, 157 L Ed 2d 263 (2003) (per curiam), a post-AEDPA case, eliminated the need to show "actual prejudice." *Fry*, 127 S Ct. at 2326-27. In *Esparza*, the Court held that where a state court has determined that a constitutional error is harmless, a federal court may not grant habeas relief under § 2254(d)(1) unless the state court's harmless error analysis was objectively unreasonable. 540 U S at 17-18, 124 S Ct at 11-12. The *Fry* Court did not abandon *Esparza*'s interpretation of AEDPA to review of constitutional errors on collateral attack, but nonetheless emphasized that Brecht's "actual prejudice" standard is the proper lense by which to "assess[ ] the prejudicial impact of federal constitutional error in a state-court criminal trial." *Fry*, 127 S.Ct. at 2327.

[24] Because the Georgia Supreme Court found the *Sabel* error harmless, Wellons will be entitled to receive habeas relief only if the Georgia Supreme Court's harmless error determination was objectively unreasonable in light of clearly established law, viz , *Brecht*

The Georgia Supreme Court deemed the *Sabel* error harmless because the evidence as a whole demonstrated that Wellons had no viable insanity and mental illness defense nor a viable actual innocence defense *Wellons*, 463 S E.2d at 876. Compared to other cases with a "greater showing of mental health problems," the court found that "[t]he evidence of guilt was overwhelming." *Id.* (citing *Bright v State*, 265 Ga. 265, 455 S.E.2d 37 (1995)). The court found that despite the *Sabel* ruling, Wellons presented ample mitigation testimony from 17 witnesses, although he presented no mental health evidence during the guilt-innocence phase *Id.* at 876 It concluded:

> [T]he error, though it might well have initially had a chilling effect on consultation with experts, was ultimately harmless. The chilling effect could have been and apparently was cured after Wellons decided to raise the insanity defense His counsel made an intelligent, strategic choice not to contest Wellons' participation in the crimes, to merely introduce the idea of mental illness in the guilt-innocence phase of trial, and then to bring every effort to bear in mitigation.

Id at 876-77. While the discussion was not framed in the precise language used in *Brecht*, this discussion follows the "substantial and injurious effect" analysis It is clear that in assessing the effect of the **941* *Sabel* error on Wellons's trial, the Georgia Supreme Court examined the record as a whole. *See Brecht*, 507 U S at 638, 113 S Ct at 1722 ("Our inquiry here is whether, in light of the record as a whole, the State's improper use for impeachment purposes of petitioner's post-*Miranda* silence ...'had substantial and injurious effect or influence in determining the jury's verdict.' ") As such, the Georgia Supreme Court's harmless error analysis was not contrary to, or an unreasonable application of *Brecht* Consequently, we cannot grant Wellons relief on the basis of this claim

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C. *Ineffective Assistance of Counsel*

[25] Wellons's ineffective assistance of counsel claims overlap with his *Sabel* arguments. He presents two theories of ineffectiveness. First, he argues that the *Sabel* ruling rendered his trial counsel ineffective by having to choose between risking prejudicial disclosure of negative expert reports or foregoing expert testimony to support his mental health defense at trial. Second, Wellons argues that his trial counsel was ineffective in implementing its chosen strategy after it became clear that the trial court would not reverse its *Sabel* rulings.

[26] Wellons's ineffectiveness arguments are governed by test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*'s two-pronged analysis, Wellons must show (1) that his trial counsel's performance was deficient, and (2) that the deficiency deprived Wellons of a fair trial, "a trial whose result is reliable." *Id.* at 687, 104 S.Ct. at 2064.

[27][28] Because we have held that the Georgia Supreme Court's conclusion that the *Sabel* ruling is harmless error is not contrary to, nor an unreasonable application of *Brecht*, Wellons's argument that the *Sabel* ruling rendered counsel constitutionally ineffective is foreclosed. Wellons's alternative ineffectiveness argument-that trial counsel were constitutionally ineffective in implementing the defense and mitigation strategies chosen in response to the *Sabel* ruling-also lacks merit. To show deficiency under the first prong of his ineffectiveness claim, Wellons must show that his trial counsel's performance was not reasonable under the circumstances. *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065. This is a highly deferential standard by which we look to "[p]revailing norms of practice as reflected in American Bar Association standards and the like [as] guides to determining what is reasonable." *Id.* To meet this high burden, "[a] convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690, 104 S.Ct. at 2066. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

Wellons argues that his trial counsel's performance was unreasonable because they did not adequately investigate and present "key witnesses" to testify about his family history of substance abuse, sexual dysfunction, sexual abuse, and neurological impairment at both stages of his trial. Wellons argues that had counsel pressed on in its investigation regardless of the trial court's *Sabel* rulings, counsel would have discovered expert opinions presented by Dr. Wood during the state habeas proceeding, in which he concluded that Wellons was legally insane when he killed India Roberts. According to Wellons, trial counsel also would have had the benefit of Dr. Grant's expert testimony, which was also presented at the state habeas proceeding. Dr. Grant testified that Wellons *942 suffers from severe neurological impairments, Post-Traumatic Stress Disorder, and possibly an epileptiform seizure disorder. As for his ineffectiveness claims at the penalty phase, Wellons acknowledges that trial counsel interviewed several people and presented 17 mitigation witnesses-including a sociologist and psychologist-but nonetheless argues that counsel was deficient in investigating his background.

[29] "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. We cannot ignore the circumstances under which counsel made the decision to forego mental health expert testimony during the guilt phase of trial. Wellons's trial counsel faced a very difficult choice as a result of the *Sabel* ruling. If they decided to pursue expert testimony, and the expert re-

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ports proved unfavorable for Wellons, the prosecution would have been entitled to these reports and could have called the very experts Wellons's counsel declined to present In light of all this, the Georgia Supreme Court's conclusion that Wellons's counsel "made an intelligent, strategic choice not to contest Wellons' participation in the crimes, to merely introduce the idea of mental illness in the guilt-innocence phase of trial, and then to bring every effort to bear in mitigation," *Wellons*, 463 S E 2d at 876-77, is neither contrary to, nor an unreasonable application of *Strickland*

D *Constitutionality of Georgia's Death Penalty System*

[30] Wellons attacks the constitutionality of Georgia's use of the three-drug protocol method of execution by lethal injection He argues that the three-drug protocol violates the Eighth Amendment's prohibition against cruel and unusual punishment and that the district court erred in denying an evidentiary hearing on his Eighth Amendment claim. Both of these claims have been foreclosed by *Baze v Rees*, --- U S ----, 128 S Ct 1520, 170 L.Ed.2d 420 (2008), in which the United States Supreme Court upheld a similar three-drug lethal injection protocol as not constituting cruel and unusual punishment under the Eighth Amendment.[FN9]

FN9. Wellons also argues that the Georgia death penalty system violates the Equal Protection Clause of the Fourteenth Amendment because it is administered without uniform and specific standards Wellons's allegations fail to establish a prima facie case of intentional discrimination against a protected class. As the Supreme Court has emphasized, "there is not 'any one right way for a State to set up its capital sentencing scheme' " *Morgan v Illinois*, 504 U S. 719, 725-26, 112 S.Ct. 2222, 2228, 119 L.Ed.2d 492 (1992) (quoting *Spaziano v. Florida*, 468 U S. 447, 464, 104 S Ct. 3154, 3164, 82 L Ed 2d 340 (1984)).

IV. CONCLUSION

We conclude that the district court did not err in denying Wellons's motions for discovery and an evidentiary hearing on his judge, juror, and bailiff misconduct claims Nor did the district court err in denying Wellons's due process and ineffective assistance of counsel claims related to the *Sabel* error because the state court's decisions were neither contrary to, nor an unreasonable application of clearly established Supreme Court law, viz., *Brecht* and *Strickland*. We also conclude that the district court did not err in rejecting Wellons's claims regarding Georgia's death penalty system For the foregoing reasons,*943 we affirm the district court's order denying Wellons's habeas petition.

AFFIRMED.

C.A.11 (Ga.),2009.
Wellons v. Hall
554 F.3d 923, 21 Fla. L Weekly Fed C 1359

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APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAR 05 2009
THOMAS K. KAHN
CLERK

No. 07-13086-P

MARCUS WELLONS,

Plaintiff-Appellant,

versus

HILTON HALL, Warden,
Georgia Diagnostic and
Classification Prison,

Defendant-Appellee.

On Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: TJOFLAT, BLACK and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta
FEB 28 2007
JAMES N. HATTEN, Clerk
By: Deputy Clerk

MARCUS WELLONS,	:	
Petitioner,	:	CIVIL ACTION NO.
	:	1:01-CV-1296-WBH
v.	:	
	:	DEATH PENALTY
FREDERICK HEAD, Warden,	:	HABEAS CORPUS
Respondent.	:	28 U.S.C. § 2254
	:	

FINAL ORDER

I. Introduction

Petitioner, a prisoner currently under sentence of death by the State of Georgia, has pending before this Court a habeas corpus action pursuant to 28 U.S.C. § 2254. This matter is now before the Court for a final consideration of the petition and the various briefs in support thereof and in opposition thereto.

This Court must render judgment regarding the following general areas:

1. Whether a hearing is necessary regarding Petitioner's claims of juror, judge and bailiff misconduct (Grounds 2, 28, 29, and 30), his claim that lethal injection as practiced in Georgia is unconstitutional (Ground 40), and to develop his argument of cause and prejudice with respect to those claims that were deemed by this Court to be procedurally barred in the Order of May 23, 2006. [Doc. 57].

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2. Whether Petitioner has established cause and prejudice so as to lift the procedural bar found to apply to Petitioner's Grounds 1, 3b,[1] 3f, 3g, 3h, 3i, 3j, 3m, 3o, 3t, 3u, 3v, 3w, 3y, 3aa, 3ab, 3ac, 3ad, 3ae, 3af, 3ah, 3ai, 3aj, 3am, 3an, 3ao, 3as, 3at, 3z, 5c, 5d, 6c, 6d, 6e, 6f, 7f, 8q, 9b, 10a, 11, 14, 18c, 19, 20, 21, 28, 30, 32, 35, 37, and 38, which were determined by this Court to be procedurally barred in the Order of May 23, 2006. [Id.].

3. For the remaining claims that are not procedurally barred, whether Petitioner is entitled to federal habeas corpus relief.

II. Procedural History[2]

Petitioner, Marcus Wellons, was indicted in the Superior Court of Cobb County, Georgia on April 5, 1990, and convicted of malice murder and rape in the Superior Court of Cobb County on June 6, 1993. He was sentenced to death for the murder conviction on June 8, 1993.[3] After the trial court denied Petitioner's motion for new

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[1] See the Order of May 23, 2006, [Doc. 57 at 8], regarding the numbering system for Petitioner's grounds for relief.

[2] For the benefit of future reviewing courts, this procedural history and the factual summary set forth below is repeated from this Court's Order of May 23, 2006. [Doc. 57].

[3] Petitioner was also sentenced to life imprisonment for the rape conviction.

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trial, the Georgia Supreme Court affirmed his convictions and sentences on November 20, 1995, and denied his motion for reconsideration on December 15, 1995. Wellons v. State, 463 S.E.2d 868 (Ga. 1995). The United States Supreme Court denied his petition for writ of certiorari on October 7, 1996. Wellons v. Georgia, 519 U.S. 830 (1996).

Petitioner filed a state habeas corpus petition on May 27, 1997 and an amended petition on October 28, 1997, in the Superior Court of Butts County. After an evidentiary hearing, the state habeas corpus court denied habeas corpus relief on July 20, 1998.[4] Petitioner then filed an application with the Georgia Supreme Court for a certificate of probable cause to appeal the denial of his state habeas petition on October 27, 1998, which was denied on January 9, 2001. The Georgia Supreme Court also denied Petitioner's motion for reconsideration on April 13, 2001. The United

---

[4] The state habeas corpus court classified Petitioner's claims into three categories: (1) certain claims raised and litigated on appeal were barred from review in the state habeas proceeding pursuant to Elrod v. Ault, 231 Ga. 750, 750 (1974) ("After an appellate review the same issue will not be reviewed on habeas corpus."); (2) certain claims were dismissed as procedurally barred because Petitioner failed to timely object to alleged trial errors or did not timely pursue the claims on direct appeal pursuant to Black v. Hardin, 255 Ga. 239, 240 (1985) (precluding review of untimely claims by a state habeas court unless Petitioner can establish either "cause and prejudice" or "miscarriage of justice."); and (3) Petitioner's claims for ineffective assistance of trial and appellate counsel were properly raised during the state habeas case. Upon review, the state habeas corpus court held that Petitioner failed to carry his burden of establishing ineffective assistance of counsel and denied those claims.

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States Supreme Court denied his petition for writ of certiorari on October 29, 2001. Wellons v. Turpin, 534 U.S. 1001 (2001).

Petitioner filed his first petition for writ of federal habeas corpus, [Doc. 1], with this Court on May 18, 2001, an amended petition, [Doc. 11], on September 30, 2002, and a second amended petition, [Doc. 29], on March 19, 2004, asserting forty (40) claims for relief. In an Order dated February 23, 2006, the Court denied Petitioner leave to conduct discovery, [Doc. 55].

III. Factual Summary

According to the Georgia Supreme Court in Petitioner's direct appeal, the evidence presented at Petitioner's trial was sufficient to establish the following:

> Throughout the summer of 1989, Wellons lived with his girlfriend, Gail Saunders, in her townhouse apartment in Cobb County. Early that summer, Saunders' 14-year-old son Tony also lived in the apartment. Tony and the victim, who lived in a neighboring apartment with her mother, were friends. The victim occasionally visited Tony inside Saunders' apartment, where the two youths would watch television or play Nintendo. Wellons encouraged Tony to date the victim, remarking several times that she was a good looking girl. At some point during the summer, Tony moved to Chattanooga to live with his grandparents. The victim continued to spend time with Saunders occasionally. Saunders described herself as the victim's "play mommy" with whom the victim shared confidences.
>
> Wellons and Saunders had become acquainted at the hospital where both worked, Wellons as a counselor in the psychiatric ward. Wellons moved

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in with Saunders on the pretense that he owned a home but was unable to occupy it, because an ex-girlfriend had moved there with her two young daughters, and he could not in good conscience turn them out. Over the summer Wellons proposed marriage to Saunders. However, by then Saunders had become wary of Wellons, who was increasingly hostile and abusive. She verbally accepted his proposal out of fear, all the while seeking an escape from her predicament.

On the evening of August 30, 1989, Saunders told Wellons that their relationship was over and that he must move out of her apartment. Wellons, who had recently been fired from his job, purchased a one-way ticket to Miami for a flight departing on the evening of August 31. Fearing to be alone with Wellons the night before his departure, Saunders told Wellons that she was going to Chattanooga to spend the night with her parents and enroll Tony in school. Instead, Saunders went to the home of a female friend.

That evening, Wellons began making desperate attempts to reach Saunders by telephone. He called her mother in Chattanooga repeatedly, only to be told that Saunders had not arrived. Wellons then called Saunders' friends, but no one knew or revealed her whereabouts. He called his mother and told her he suspected that Saunders was with another man. Wellons became increasingly angry and began drinking. He ransacked Saunders' apartment. He overturned potted plants and furniture, threw flour onto the floor, and poured bleach over all of Saunders' clothes, carefully sparing his and Tony's belongings in the process.

After the apartment was demolished, Wellons began attempts to cover up his deed. He broke a window, from the inside out, cutting his hand in the process and smearing blood around the apartment. He stacked electronic equipment by the door. He then called 911 at approximately 3:00 a.m. on August 31 to report a burglary. When a police officer arrived, Wellons told the officer that he had come home to find the apartment ransacked, although no items were missing. Wellons explained to the officer that he cut his hand while struggling to uncover a stash of money to determine

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if it had been taken. Sometime after the officer left, Wellons wrote a racial slur across the wall in Saunders' bedroom.

Several hours later, at approximately 8:00 a.m., the victim said goodbye to her mother and walked from her apartment, past Saunders' door, toward the school bus stop. Shortly thereafter, Saunders' next door neighbor heard muffled screams from inside Saunders' apartment.

The apartment building was close to a wooded area, beyond which was a grocery store. At approximately 2:00 p.m., Wellons approached an acquaintance who was employed at the grocery store and asked to borrow a car. The acquaintance refused. Wellons told the acquaintance that when he (Wellons) returned home the previous night, he encountered two white men who were burglarizing the apartment. Wellons said that he successfully fought off the intruders but explained that he had in the process sustained the injuries to his hand.

About half an hour later, Theodore Cole, a retired military police officer, was driving near the wooded area behind the apartment complex. He spotted in the distance a person carrying what appeared to be a body wrapped in a sheet. He distinctly saw feet dangling from the bottom of the sheet. Cole drove on but then returned for a second look. He drove around in the parking lot of the apartment complex and saw nothing. As he was driving away, however, he saw a man in his rear view mirror walk along the road and throw a sheet into the woods. Cole drove directly to the grocery store, where he called 911. Police officers arrived quickly and began a search of the woods.

The police first discovered sheets, clothing and notebooks bearing Tony's name. Then, upon close inspection of a pile of tree branches near where he had seen the man carrying the sheet, Cole spotted the body of India Roberts. When the branches were removed, the officers discovered that the victim was completely unclothed, with cuts on one side of her face and ear and bruises on her neck.

During the search of the woods, Cole spotted a black man with a bundle under his arm near the apartment building and identified him as the man

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Cole had seen carrying the sheet. Cole and an officer chased the man, but as they approached the building, the man turned the corner and Cole and the officer heard a door shut. The officer learned from a passerby which apartment was occupied by a man fitting the description given by Cole. He knocked on Saunders' door and announced his presence, but there was no answer. He returned to join the other officers, who were investigating the scene in full force, with helicopters overhead.

Wellons, now trapped inside Saunders' apartment with residual evidence of his crime, gave up his attempt to dispose of the evidence in the woods. He first tried to clean the apartment and his clothes. He then abandoned that project, changed into swim wear, grabbed an old, yellowed newspaper and a cup of wine, partially barricaded and locked the door, and headed for the pool. On his way, Wellons caught sight of a police officer and stopped abruptly. The officer began questioning him. Initially evasive, Wellons did ultimately tell officers that the injuries to his hand, and new scratches to his face, were sustained during a scuffle with two men whom he had caught burglarizing Saunders' apartment.

While investigating the scene, officers had asked Cole whether either of two black males was the man Cole had seen carrying the sheet. Cole immediately ruled out each of the men. Then, while officers were questioning Wellons, one officer standing at a distance from the questioning asked Cole whether Wellons was the man he had seen. Cole said that although Wellons was wearing different clothing from the man he had seen carrying the sheet, and whom he had again seen near the complex, Cole was 75 to 80 percent certain that Wellons was the same man.

Later that day, officers searched Saunders' apartment. Inside, they found numerous items of evidence including the victim's notebooks and earrings. In Tony's room, they discovered the victim's panties. They also found blood on Tony's mattress and box springs. The mattress had been flipped so that the bloody portion was facing downward, and the bed had been remade.

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> The autopsy revealed that the victim died from manual strangulation, which in itself would have taken several minutes. The autopsy also showed that Wellons had attempted to strangle the victim with a ligature, possibly a telephone cord, and that he had bruised her and cut her face and ear with a sharp object. The evidence suggested that Wellons had dragged or otherwise forcibly moved the victim from the kitchen up the stairs to Tony's bedroom. Finally, the autopsy revealed a vaginal tear and copious amounts of what appeared to be seminal fluid within the victim's vagina. She had defensive wounds to her hands, and her blouse was stained with her own blood.
>
> Although a not guilty plea was entered for Wellons, he did not dispute his participation in the crimes. Instead, he urged the jury to return a verdict of not guilty by reason of insanity or guilty but mentally ill.

Wellons v. State, 463 S.E.2d 868, 873-875 (Ga. 1995).

Under 28 U.S.C. § 2254(e), the foregoing factual determinations are presumed correct unless Petitioner presents clear and convincing evidence that the state court determinations were erroneous.

IV. Discussion

A. Habeas Corpus Standard of Review

Pursuant to 28 U.S.C. § 2254, a federal court may issue a writ of habeas corpus in behalf of a person held in custody pursuant to a judgment of a state court if that person is held in violation of his rights under federal law. 28 U.S.C. § 2254(a). This power is limited, however. Under 28 U.S.C. § 2254(d), a federal court may not grant

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habeas relief for claims previously adjudicated on the merits by state courts unless the state court adjudication resulted in a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

In Williams v. Taylor, 529 U.S. 362 (2000), the Supreme Court analyzed how federal courts should apply § 2254(d). First, the federal court evaluating a habeas petition under § 2254(d)(1) must determine the applicable "clearly established Federal law as determined by the Supreme Court of the United States." See 28 U.S.C. § 2254(d)(1). Next, the federal habeas court must ascertain whether the state court decision is "contrary to" that clearly established federal law by determining if the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court reached a result different from the Supreme Court on a set of materially indistinguishable facts. Williams, 529 U.S. at 405.

If the federal habeas corpus court determines that the state court decision is not contrary to clearly established federal law, the federal court must then determine whether the state court decision was an "unreasonable application" of clearly established federal law by determining whether the state court identified the correct governing legal principle from the Supreme Court's decisions but unreasonably

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applied that principle to the facts of the case. Id. This reasonableness determination is objective, and a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court was erroneous or incorrect. Id. at 410. In other words, it matters not that the state court's application of clearly established federal law was incorrect, so long as that misapplication was objectively reasonable. Id. ("[A]n unreasonable application of federal law is different from an incorrect application of federal law.").

B. An Evidentiary Hearing is not Necessary

At the outset, this Court notes that many of Petitioner's arguments in favor of an evidentiary hearing are foreclosed by the Order of February 23, 2006, [Doc. 55], in which this Court concluded that Petitioner was not entitled to leave to conduct discovery. Because the standard for granting leave to conduct discovery in a habeas corpus action is materially the same as that for granting an evidentiary hearing, this Court's conclusions in the February 23, 2006, order, which are now the law of the case, necessarily limit the extent to which this Court may grant an evidentiary hearing.

As part of the AEDPA, Congress added 28 U.S.C. § 2254(e)(2) which states:

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> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on-
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

"By the terms of its opening clause [§ 2254(e)(2)] applies only to prisoners who have 'failed to develop the factual basis of a claim in State court proceedings.'" Williams v. Taylor, 529 U.S. 420, 430 (2000). "[A] failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Id. at 432. A prisoner can establish diligence by demonstrating that he was thwarted by forces outside of his control in his efforts to develop the evidentiary record of a claim or that "efforts to discover the facts would have been in vain." Id. at 435. If the petitioner can make such a showing, then pre-AEDPA law would apply to determine whether a hearing is mandated. Under pre-AEDPA law, because state court findings of fact are entitled to

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a presumption of correctness, a federal court should conduct a hearing on factual questions only if the state did not conduct "a full, fair, and adequate hearing." Routly v. Singletary, 33 F.3d 1279, 1284 (11th Cir. 1994) (quoting 28 U.S.C. § 2254(d)(6)). The petitioner bears the burden of establishing the need for an evidentiary hearing in federal court. See id. Where a state hearing was held,

> a habeas petitioner is "entitled to an evidentiary hearing if he can show cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure." Keeney[v. Tamayo-Reyes, 504 U.S. 1], 11 (1992). Alternatively, the petitioner is permitted to develop additional facts at the federal level if he could "show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." Id. at 12.

Kelley v. Secretary for Dept. of Corrections, 377 F.3d 1317, 1335 (11th Cir. 2004).

The cause and prejudice standard discussed in Kelley and Keeney is the same cause and prejudice standard employed to determine whether a federal habeas corpus Petitioner is entitled to review of a procedurally barred claim. Keeney, 504 U.S. at 8. That standard is discussed in greater detail below.

As noted, Petitioner seeks a hearing on three distinct areas: (1) his claims of judicial, juror and bailiff misconduct, (2) his claim that lethal injection as practiced in Georgia is unconstitutional, and (3) to develop his argument of cause and prejudice with respect to those claims that were deemed by this Court to be procedurally barred.

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With respect to his claims of judicial, juror and bailiff misconduct and his claim that lethal injection is unconstitutional, this Court's decision not to grant a hearing is discussed below in relation to its discussion on the merits of those claims .

As to Petitioner's request for a hearing regarding procedurally barred claims, this Court will not hold a hearing because, as is demonstrated in the following discussion, Petitioner has generally failed to argue cause and prejudice in his final brief. In order to establish that a hearing is necessary, Petitioner must, at the very least, demonstrate that a factual dispute exists with respect to a material issue. Pugh v. Smith, 465 F.3d 1295, 1300 (11th Cir. 2006). As Petitioner has failed to argue that cause and prejudice should excuse his procedurally barred claims, he cannot demonstrate a material factual dispute or the necessity of a hearing.

C. Petitioner has Failed to Demonstrate Cause and Prejudice with Respect to the Procedurally Barred Grounds

By Order of May 23, 2006, [Doc. 57], this Court concluded that Petitioner's Grounds 1, 3b, 3f, 3g, 3h, 3i, 3j, 3m, 3o, 3t, 3u, 3v, 3w, 3y, 3aa, 3ab, 3ac, 3ad, 3ae, 3af, 3ah, 3ai, 3aj, 3am, 3an, 3ao, 3as, 3at, 3z, 5c, 5d, 6c, 6d, 6e, 6f, 7f, 8q, 9b, 10a, 11, 14, 18c, 19, 20, 21, 28, 30, 32, 35, 37, and 38 of the instant federal petition are procedurally barred. [Id. at 31-32, 40]. This Court dismissed the foregoing grounds

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without prejudice to Petitioner's showing of cause and prejudice to lift the procedural bar.

In the May 23, 2006, Order this Court discussed the requirements of overcoming a procedural bar by demonstrating either cause and prejudice for the default or a fundamental miscarriage of justice that would arise from this Court's failure to review the claim at issue:

> A petitioner may overcome a procedural default by either demonstrating both cause excusing the default and actual prejudice resulting from the bar or, in extraordinary cases, demonstrating that a review of the claim is necessary to correct a fundamental miscarriage of justice. [Hill v. Jones, 81 F.3d 1015, 1022-23 (11th Cir. 1996).]
>
> The determination of cause to excuse a procedural default "must ordinarily turn on whether the petitioner can show that some objective factor external to the defense impeded counsel's efforts to comply with the procedural rule." [Putman v. Turpin, 53 F. Supp. 2d 1285, 1292 (M.D. Ga. 1999)] (citing Murray v. Carrier, 477 U.S. 478 (1986)). The petitioner must show that there was "some external impediment preventing counsel from constructing or raising the claim." Id. To demonstrate prejudice, a petitioner "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 171 (1981).
>
> If a petitioner cannot show both cause and prejudice, a federal court "may consider procedurally defaulted claims only if a failure to do so would result in a fundamental miscarriage of justice." Putman, 53 F. Supp.2d at 1292. Regarding what is necessary in order for a petitioner to succeed on a claim of fundamental miscarriage of justice, the Eleventh Circuit has stated as follows:

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> To excuse a default of a guilt-phase claim under [the fundamental miscarriage of justice] standard, a petitioner must prove a constitutional violation [that] has probably resulted in the conviction of one who is actually innocent. . . . To gain review of a sentencing-phase claim based on manifest injustice, a petitioner must show that but for constitutional error at his sentencing hearing, no reasonable juror could have found him eligible for the death penalty under [state] law.

Hill, 81 F.3d at 1023 (citations omitted).

[Doc. 57 at 26-27]. When a petitioner who has procedurally defaulted claims in the state court makes no attempt in his federal habeas proceedings to show cause or prejudice for the default, the claims are not cognizable in federal court. Gray v. Netherland, 518 U.S. 152, 162 (1996).

This Court notes that, in his Final Brief, [Doc. 61], Petitioner never directly argues cause and prejudice to excuse any of the aforementioned procedural bars. He makes some assertions that imply that forces beyond his control prevented him from raising certain claims, but he generally fails to discuss prejudice or demonstrate a miscarriage of justice. In most instances, however, Petitioner simply disputes this Court's conclusions that certain claims were procedurally barred. Without commenting on the propriety of Petitioner's arguments or the manner in which they were raised, this Court will again address Petitioner's arguments.

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1. Ground 1

In his Ground 1, Petitioner argues that he was denied access to exculpatory information in violation of Brady v. Maryland, 373 U.S. 83, 87 (1963). This Court concluded that Ground 1 is procedurally barred because, in an adequate and independent state ground for denying relief, the state habeas corpus court denied relief on the claims because of a procedural default. [Doc. 57 at 31].

In response to this Court's conclusion that Ground 1 is procedurally barred, Petitioner does not directly discuss cause and prejudice. Rather, Petitioner states that "[t]he Petitioner is only able to gain access to the files of the district attorney when the case is 'final' which has been interpreted by the Georgia Supreme Court to mean after the appeal is concluded." [Doc. 61 at 14-15]. Petitioner has not established, nor even argued, that he did not have access to the purportedly exculpatory information via other sources or that he could not have obtained that information through due diligence at an earlier point. He merely argues that, under the law of Georgia, prosecutors are not required to allow access to their files until after the appeal has concluded. Additionally, Petitioner made no showing of cause and prejudice in his state habeas corpus proceeding for his having failed to raise his Brady claim in his direct appeal. [Resp. Exh. 64 at 19].

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Accordingly, having reviewed the record, this Court finds that Petitioner's argument is insufficient to demonstrate cause and prejudice to lift the bar of the procedural default of his Ground 1.

Moreover, Petitioner's claims regarding purported exculpatory evidence appear to be entirely conclusory. For example, in his petition, Petitioner states that the prosecution withheld "[e]vidence that indicated or arguably indicated that Petitioner did not commit the offense of malice murder." [Doc. 29 at 31]. All of Petitioner's assertions of a Brady violation are similarly worded – that the state withheld evidence that "indicated or arguably indicated" Petitioner's innocense or his lack of culpability. As to what that evidence is, Petitioner is silent. Instead he states that "[a]s the evidence produced before the state courts established, the state suppressed material, exculpatory evidence in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution." [Doc. 29 at 33]. But he neither offers a citation to anything in the record from the state courts that would demonstrate a Brady violation nor provides even a brief description of the evidence which the state possessed which could have had a material impact on Petitioner's trial or sentence. This Court is not obligated to sift through the voluminous record in order to uncover factual support for a petitioner's conclusory assertions, especially where that support may not exist. Adams v. Armontrout, 897 F.2d 332, 333-344 (8th Cir. 1990);

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Williams v. Kullman, 722 F.2d 1048, 1051 (2d Cir. 1983); see Rule 2, Rules Governing Section 2254 Cases (the petition must "state the facts supporting each ground").

2. Subgrounds Under Ground 3

With respect to the twenty-eight claims of ineffective assistance of counsel that this Court determined were procedurally barred, Petitioner again makes no showing of cause and prejudice. In the portion of his final brief purportedly dedicated to this discussion, Petitioner argues at length that the state supreme court's and state habeas corpus court's conclusions with respect to (1) the Sabel ruling, and (2) his ineffective assistance claims as they relate to the Sabel ruling were improper applications of federal constitutional law. This Court did not conclude that the grounds related to the Sabel ruling were procedurally barred and will address the Sabel ruling below both with respect to the ruling itself and how that ruling might have affected Petitioner's Sixth Amendment rights. As to the remaining claims of ineffective assistance of counsel that this Court concluded were procedurally barred, Petitioner has failed to argue cause and prejudice, and those claims remain procedurally barred.

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3. Grounds 5c and 5d

In his Ground 5c, Petitioner claims that his appellate counsel was ineffective for having failed to interview the jurors after the trial. In response to this Court's conclusion that Petitioner's Ground 5c is unexhausted and procedurally barred, Petitioner argues – without any support for the proposition – that the claim is not unexhausted. In what could be construed as his argument in support of an assertion of cause and prejudice to excuse the default, Petitioner further states:

> As Trial counsel did interview all potential witnesses he was permitted to interview until he was precluded, by the rulings of the trial court, from conducting further investigation on this issue. [sic] As noted throughout this brief and other pleadings, Petitioner has sought at every opportunity to present this evidence to the courts, and has been denied the opportunity to investigate and present these issues at all stages.

[Doc. 61 at 19].

Petitioner's Ground 5c is one of the many ways in which he raises his claims of misconduct among the jurors, bailiffs and the trial judge. The exact contours of the various misconduct claims is discussed at length below. For the purposes of the cause and prejudice discussion, it suffices to note only that, in pursuit of these various claims, the various counsel representing Petitioner in his appeals and post conviction proceedings have sought to interview the jurors from Petitioner's trial. It appears from the record that the Petitioner's attorneys contacted the jurors twice, once after the trial

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by the trial/appellate attorneys and once by Petitioner's state habeas corpus attorneys. [See, e.g., Resp. Exh. 50 at 167-168]. The state habeas corpus attorneys prepared a proffer regarding what they had learned after interviewing the jurors. [Petr. Exh. 1 at bates 882-87]. Petitioner's state habeas corpus attorneys certainly knew enough at the time of the state habeas corpus proceeding to determine whether the trial/appellate attorneys had acted diligently in interviewing the jurors. Accordingly, this Court concludes that Petitioner has failed to demonstrate cause and prejudice with respect to the procedural bar of his Ground 5c.

Petitioner concedes that his Ground 5d is unexhausted.

4. Grounds 6c, 6d, 6e, and 6f[5]

This Court concluded that Grounds 6c, 6d, 6e, and 6f, were procedurally barred. Those grounds concern certain jury instructions given at Petitioner's trial. Petitioner argues that trial/appellate counsel were ineffective for failing to raise these claims on appeal. Counsel's failure to raise the claims on appeal might constitute cause for the

[5] By order of May 23, 2006, this Court determined that Grounds 6c, 6d, 6e, and 6f were procedurally barred. In his final brief, Petitioner asserts that Grounds 6a and 6b were raised on appeal. This Court has not found that Grounds 6a and 6b were unexhausted.

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procedural default. As this Court demonstrates below, however, trial/appellate counsel were not ineffective.

Moreover, Petitioner has failed to demonstrate prejudice from his counsel's failure to raise the claims. This Court has reviewed the jury instructions in question and finds that, given the weighty burden of demonstrating that a jury instruction created a constitutional error, see infra discussion at Part V.B.3, a challenge to those instructions would not entitle Petitioner to relief. Accordingly, Petitioner cannot establish cause and prejudice resulted from trial/appellate counsel ineffectiveness.

5. Grounds 7f[b], 8q, 9b, 10a, 18c, 21, 32, 35, 37, and 38

Petitioner has made no argument regarding cause and prejudice regarding Grounds 7f, 8q, 9b, 10a, 18c, 21, 32, 35, 37, and 38. Accordingly those Grounds remain procedurally barred.

6. Ground 11

In his Ground 11, Petitioner asserts that trial counsel failed to obtain an adequate mental health evaluation of Petitioner. This Court determined that the claim

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[b] By order of May 23, 2006, this Court determined that Ground 7f was procedurally barred. In his final brief, Petitioner asserts that Grounds 7b, 7g, and 7i were raised on appeal. This Court has not found that Grounds 7b, 7g, and 7i were unexhausted.

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was unexhausted and procedurally barred. [Doc. 57 at 38]. In response, Petitioner again argues that the claim is exhausted because he raised the claim on appeal. This Court first notes that the claim in Ground 11 is similar to and partially subsumed by Petitioner's claims relating to the trial court's Sabel ruling, and the Sabel claims are reviewed extensively below. However, Petitioner's assertion that Ground 11 is exhausted ignores this Court's discussion in the May 23, 2006, order, [id. at 37-38], and Petitioner has made no argument that cause and prejudice should lift the procedural bar. Accordingly, Ground 11 remains procedurally barred.

7. Ground 14

In his Ground 14, Petitioner asserts that his death sentence was imposed pursuant to a statewide pattern of racial, economic and sexual discrimination. This Court determined that the claim was unexhausted and procedurally barred. [Doc. 57 at 36]. In response, Petitioner merely repeats his argument that the claim is exhausted because it was raised in his Claim 15 from his appeal. This Court has already rejected the argument. As Petitioner has made no argument that cause and prejudice should excuse the default, Ground 14 remains procedurally barred.

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8. Grounds 19 and 20

In his Ground 19, Petitioner claims that certain portions of the trial court's proceedings were not transcribed. In Ground 20, Petitioner claims that portions of the trial were conducted in Petitioner's absence. This Court ruled that both claims were procedurally barred because, pursuant to an independent and adequate state procedural rule, the state habeas corpus court concluded that Petitioner had procedurally defaulted the claims because he had not raised them on appeal. [Id. at 31]. In response Petitioner argues that the claims were raised on appeal. However, Grounds 19 and 20 were not held to be unexhausted before this Court. Rather, the state habeas corpus court ruled that the claims were procedurally defaulted. This Court is bound by that conclusion and cannot "reverse" the state court's procedural rulings on a question of state law. To the degree that Petitioner claims that the state habeas corpus court's ruling was incorrect, his sole avenue of recourse was to the Georgia Supreme Court in his certificate of probable cause to appeal the denial of habeas corpus relief.

In order to avoid the procedural bar in this Court that was created by the procedural default in state court, Petitioner must demonstrate cause and prejudice before this Court, which he has not even argued. Accordingly, Grounds 19 and 20 remain procedurally barred.

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9. Ground 28

In his Ground 28, Petitioner asserts that juror misconduct – primarily the inappropriate gifts[7] given to the judge and a bailiff – demonstrated bias against Petitioner. This Court concluded that, despite the fact that the state habeas corpus denied the claim under the doctrine of *res judicata*, the claim was actually procedurally barred because Petitioner did not raise the claim in his appeal. [Doc. 57 at 32]. In his reply brief, Petitioner initially acknowledged that Ground 28 was not raised on direct appeal, [Doc. 17 at 23-24], but in his final brief, he now argues that the claim was presented in his appeal. In support of this latest assertion, Petitioner points to the statement from his appeal brief that "It is hard to imagine that jurors would present such a gift to a judge without some personal relationship beyond that exhibited in the courtroom." [Doc. 60 at 23]. Petitioner does not attempt to demonstrate how this statement indicates or argues bias on the part of the jurors against Petitioner, and a plain reading of the statement clearly demonstrates that it refers to a purportedly questionable relationship between the jurors and the judge.

Accordingly, this Court again finds that Petitioner did not raise this claim in his appeal, and, because Petitioner has not argued cause and prejudice, Ground 28 remains procedurally barred before this Court.

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[7] The inappropriate gifts are discussed at length below.

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10. Ground 30

In his Ground 30, Petitioner asserts that the bailiff who received an inappropriate gift engaged in misconduct. As with Petitioner's Ground 28, this Court concluded that, despite the fact that the state habeas corpus denied the claim under the doctrine of *res judicata*, the claim was actually procedurally barred because Petitioner did not raise the claim in his appeal. [Doc. 57 at 32]. Again, as with Ground 28, Petitioner initially acknowledged that Ground 30 was not raised on direct appeal, [Doc. 17 at 23-24], but he now argues that the claim was presented in his appeal, [Doc. 60 at 23], and references this Court to specific pages from his appellate brief. Having reviewed the record in light of Petitioner's references to the record, this Court finds that Petitioner's Ground 30 was raised in his appeal. Accordingly, this Court prior conclusion that Ground 30 is procedurally barred is hereby vacated, and the claim is reviewed below.

V. Discussion of Petitioner's Grounds for Relief

In his second amended petition, Petitioner begins the discussion of his claims by stating:

> In this Petition, Petitioner sets forth numerous claims entitling him to federal habeas corpus relief. Although each and every claim in this Petition warrants this Court's careful review, the litigation in this case

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> essentially focuses on three distinct issues: 1) the jurors' gifts of a chocolate penis and chocolate breasts to the judge and court personnel during Petitioner's trial; 2) the trial court's discovery ruling under Sabel v. State, 282 S.E.2d 61 (Ga. 1981); and 3) whether or not Petitioner was afforded effective assistance of counsel.

[Doc. 29 at 2].

Petitioner then proceeds to enumerate approximately 139 grounds and subgrounds for relief, some of which approach, from different angles, the Three Principal[8] Claims mentioned by Petitioner as being the essential focus of this case. However, a great many of the claims raised in the petition are in no way related to the Three Principal Claims, and many of those claims either (1) appear to be entirely conclusory assertions wherein Petitioner claims error of constitutional magnitude but fails to provide any factual basis or evidentiary support for those claims or (2) appear to assert claims that have been repeatedly raised by other petitioners in other habeas corpus cases and rejected. See, e.g., Grounds 1, 2, 6, 7, 9, 12, 14, 18, 22, 23, 25, 33, 34, 36, 37, 38 and 39.

This Court generally agrees with Petitioner's characterization that the Three Principal Claims are the primary questions of review in this action. This Court would, however, further limit the final issue to only the question of ineffective assistance of

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[8] For lack of a more imaginative name, this Court will hereafter refer to the three issues that are, according to Petitioner, the essential focus of this action as the "Three Principal Claims."

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counsel during the penalty phase of Petitioner's trial. Having reviewed the evidence presented at Petitioner's trial and the record of the subsequent challenges to his conviction, this Court finds that it is clear that Petitioner, acting alone, kidnapped, sexually attacked, and murdered India Roberts. It is further clear from the evidence presented at the trial that Petitioner was aware of what he had done and that he attempted, however ineffectively, to hide his guilt. Put simply, the record clearly demonstrates Petitioner's criminal culpability and nothing presented in the petition effectively indicates that Petitioner is innocent of the crimes for which he was convicted. Moreover, the overwhelming evidence of Petitioner's guilt was such that no attorney, however talented, could be reasonably expected to secure an acquittal during the guilt phase of Petitioner's trial.

Because of his actions after the murder – e.g., secreting the body, attempting to clean his apartment, attempting to clean his clothes, attempting to elude the police, and repeatedly relating the farcical story regarding the alleged burglary of his apartment – it is abundantly clear that Petitioner was well aware of the difference between right and wrong and that his actions in sexually attacking and killing India Roberts were illegal. Thus, a finding of not guilty by reason of insanity under Georgia law was impossible. Echols v. State, 255 S.E.2d 92 (Ga. Ct. App. 1979) ("Legal 'insanity' relates only to the ability of a defendant to distinguish between right and wrong, and

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whether he had a delusional compulsion which overmastered his will."); see O.C.G.A. §§ 16-3-2, 16-3-3. Although the evidence suggests that Petitioner might not have been mentally stable at the time of the crime, pursuant to O.C.G.A. § 17-7-131(g)(1), a finding of guilty but mentally ill, by itself, would not have prevented Petitioner's death sentence. In summary, this Court finds that nothing presented by Petitioner undermines its confidence in the outcome of the guilt-innocense phase of the trial.

On the other hand, this Court recognizes, as is noted above, that the evidence suggests that Petitioner might not have been mentally stable at the time he committed his crimes. In initially reviewing the record in light of the criminal trial court's procedural rulings, this Court was concerned about whether trial counsel had an opportunity to present, and did in fact effectively present, mitigating evidence regarding Petitioner's mental state and mental history during the penalty phase of the trial. This inquiry implicates the second and third of the Three Principal Claims mentioned above – the Sabel ruling by the trial court and the effectiveness of Petitioner's trial counsel.

Additionally, this Court agrees with the Petitioner that the inappropriate gifts given by the jury to the trial judge and a bailiff was an unusual event that warrants close inquiry. The following discussion regarding Petitioner's grounds for relief will

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focus first on the Three Principal Claims and then will review Petitioner's remaining claims.

A. The Three Principal Claims

1. Judicial, Juror and Bailiff Misconduct[9]

Apparently, during the trial, while the jurors were eating at a restaurant, the judge stopped by and had a brief discussion with the jurors. The exact content of this discussion is not known, although Petitioner presented a proffer to the state habeas corpus court which indicates that nothing of significance was discussed. [Petr. Exh. 1 at bates 882-87]. Petitioner's trial counsel were not made aware of this encounter, and they found out about it at some point after the trial.

Apparently, toward the end of the trial, one or more of the jurors presented the judge and one of the female bailiffs with inappropriate gifts: the judge received a chocolate penis and the bailiff received a pair of chocolate breasts. The judge did not inform trial counsel about the inappropriate gifts, and trial counsel discovered after the conclusion of the trial that the gifts had been given. Also, during the state's

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[9] This discussion generally covers the claims raised by Petitioner in his Grounds 5e, 5f, 5g, 19b, 19c, 20b, 20c, 28, 29, 30, and 31, although, admittedly, some of those claims have been ruled procedurally barred.

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closing argument during the penalty phase, Petitioner contends that the judge openly wept.

With respect to Petitioner's claims of juror, judge and bailiff misconduct, an evidentiary hearing is not warranted. As is discussed below, this claim does not entitle Petitioner to relief, even were Petitioner to further develop the record. Moreover, Petitioner has not established that a hearing is necessary, especially considering the limitations on the type of testimony that could be presented in a hearing. See generally, Tanner v. United States, 483 U.S. 107 (1987). Pursuant to Rule 606(b) of the Federal Rules of Evidence:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Rule 606(b) clearly applies to § 2254 proceedings. Fed. R. Evid. 1101(e); e.g., Fields v. Brown, 431 F.3d 1186, 1207 (9th Cir. 2005); Williams v. Price, 343 F.3d 223, 230 n.3 (3d Cir. 2003); Gosier v. Welborn, 175 F.3d 504, 511 (7th Cir. 1999).

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Accordingly, this Court cannot permit Petitioner to subpoena the jurors to testify in this proceeding. The only remaining potential witnesses identified by Petitioner are the trial judge, the bailiff, and the court reporter. The trial judge's opinion on the issues at hand are already a part of the record by virtue of her having refused, in a written order, to recuse herself during the motion for a new trial proceedings. As is discussed below, Petitioner has failed to demonstrate even a suspicion that the bailiff did anything wrong, and the court reporter submitted an affidavit which details her knowledge.

Furthermore, before this Court grants a hearing, Petitioner must first demonstrate a reasonable possibility that the evidence presented at the proposed hearing will establish that he is entitled to some form of relief. Petitioner has made no proffer to this Court regarding what testimony he seeks to present at a hearing on his misconduct claims, but he did present a proffer to the state habeas corpus court. The entire contents of that proffer are quoted below, and for the purposes of the discussion of Petitioner's misconduct claims on the merits, this Court will accept those contents as evidence of what occurred. Having reviewed the proffer, this Court concludes that Petitioner has failed to demonstrate a reasonable possibility that he is entitled to relief on his misconduct claims, and a hearing will not provide any information that would change the outcome of this action.

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Turning now to the merits of Petitioner's claims, the Georgia Supreme Court reviewed certain aspects of Petitioner's claims regarding these events:

> [Petitioner] contends that the trial judge should have recused herself because she and the bailiffs allegedly had improper communications with jurors. [Petitioner] supports his allegations solely with affidavits of defense counsel relating hearsay regarding post-trial interviews with jurors. He contends first that the judge spoke with the jurors in a restaurant on one occasion and second that, at or before the close of the sentencing phase, jurors presented the judge and a bailiff with gag gifts.
>
> We find no error. Upon being presented with a motion for recusal pursuant to Uniform Superior Court Rule 25.1, it is the duty of the trial judge to determine whether, assuming the truth of any of the facts alleged, a reasonable person might conclude that the judge harbors a bias, stemming from an extra-judicial source, which is of such a nature and intensity that it would impede the exercise of impartial judgment. Birt v. State, 256 Ga. 483, 485-486, 350 S.E.2d 241 (1986). Assuming that the trial judge in fact encountered and spoke to the jurors in a restaurant and that she and a bailiff were the passive recipients of gag gifts, there was no basis for concluding that judicial bias existed.
>
> [Petitioner] next contends that the trial judge should have recused herself because she allegedly displayed emotion in the presence of the jury during the state's closing argument in the penalty phase. This allegation was supported solely by the affidavit of trial counsel regarding his personal observations during trial. Pursuant to USCR 25.1, motions to recuse must be filed "not later than five days after the affiant first learned of the alleged grounds for disqualification." [Petitioner's] motion was filed several months after trial. Therefore, the trial court properly found that [Petitioner] failed to satisfy the time requirement or to show good cause for such failure, and denial of the motion to recuse was proper. See USCR 25.3; Pope v. State, 257 Ga. 32, 35, 354 S.E.2d 429 (1987).
>
> There is no merit to [Petitioner's] contention that the trial judge erred in failing to disqualify herself from presiding over the motion for new trial

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> after [Petitioner] gave notice that she would be a witness regarding the issues involved in the motion to recuse.

Wellons, 463 S.E.2d at 880-81.

The state habeas corpus court held that these issues had either already been decided by the state supreme court or were procedurally defaulted because Petitioner was aware of the facts at the time of the appeal but failed to raise them. [Resp. Exh. 64 at 7-8, 17]. Petitioner argues that he could not properly bring these issues before the state supreme court because he had no opportunity to fully develop and present evidence regarding these issues. The trial judge would not recuse herself, and she would not testify regarding her actions during the trial.

Moreover, while it appears that Petitioner raised his claims of misconduct in his appeal, the state supreme court did not clearly address those claims and instead focused solely on whether the trial judge had acted properly in failing to recuse herself in the motion for a new trial hearing. The state supreme court did not address directly the issues of whether the trial judge engaged in misconduct with respect to the inappropriate gifts or in weeping during the penalty phase of the trial, whether the jury engaged in misconduct in giving the inappropriate gifts to the judge and bailiff, and whether one of the bailiffs engaged in misconduct because she received an inappropriate gift.

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During the state habeas corpus proceedings, Petitioner's attorneys worked diligently to litigate his claims of juror, judge, and bailiff misconduct. The state habeas corpus judge, however, would not permit a hearing on the claims, and he ruled that Petitioner's counsel could not contact the jurors unless counsel first informed the judge of the name and address of the juror(s) they intended to contact so that the judge could write the juror(s) a letter informing them of their right not to discuss the case if they so chose. [Resp. Exh. 49 at 57]. The state habeas corpus judge did not limit the contacts that Petitioner's counsel could have with the trial judge or court personnel. [Id.]. It is clear from the record that all of the jurors were contacted by trial counsel and that, prior to entry of the state habeas corpus court's order limiting contact with the jurors, Petitioner's state habeas corpus counsel contacted all but one of the jurors seeking their comments. Some of the jurors contacted by habeas corpus counsel refused to discuss the case while others related their comments.

Although the state habeas corpus court determined that it could not rule on the issues surrounding judicial, juror, and bailiff misconduct because the state supreme court had disposed of those issues, the judge did permit counsel for Petitioner to file a proffer of the information that they had collected regarding these claims so that Petitioner could perfect the record on the matter. In the proffer, Petitioner showed the following:

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1. Juror Doreen DeArmond was contacted. She stated that she was concerned that she might say something that would be used for a mistrial.

Ms. DeArmond did not know whose idea it was to send the chocolate penis to the judge. She stated that she thought it happened right after the trial. She was not sure who delivered the chocolate penis to the judge, but thought that someone must have just handed it to her. Ms. DeArmond could not recall whose decision it was to give the judge a chocolate penis. She said the decision may have been made while the jurors were standing out in the hall waiting to talk on the phone at the hotel because this is where the jurors talked since they could not go into the rooms of the other jurors. Ms. DeArmond stated that "we," the jurors gave a pair of chocolate breasts to the bailiff and the chocolate penis just followed. Ms. DeArmond said that it had gotten around the court that they had sent this to the judge. She also stated that they knew that everyone would say that this jury was different from other juries.

2. Juror Lynne Henry was contacted. Ms. Henry stated that during one of the meals, the judge presiding over [Petitioner]'s case was at the same restaurant. She said that the jurors were in a separate room from the other diners, and at some point during the meal, the judge came into the room and spoke to the jurors.

Ms. Henry then stated that some of the jurors decided to send a pair of edible chocolate breasts to one of the female bailiffs and an edible chocolate penis to the trial judge. She recalled that the chocolate penis and breasts were given to the bailiff and the judge during deliberations or shortly thereafter.

While talking about the sentencing, Ms. Henry said that she did not want to vote for death, but the jury was not given the option of life without parole. She also said that there were a few jurors who were against the death penalty, but who changed their minds quickly when they found out that the defendant would get out in seven years.

Ms. Henry also stated that after the trial, the jury, along with the bailiffs, Major "Dad" Ingram and Loretta Perry had a reunion.

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3. Juror Marie Givhan was contacted. Ms. Givhan stated that after the trial juror Mary Jo Hooper gave the penis to the judge. Ms. Givhan was not as certain about the chocolate breasts, but remembered only hearing about it.

Ms. Givhan recalled the incident where the judge was at the same restaurant where the jury was eating.

With respect to the Defendant's sentence, Ms. Givhan stated that the jury believed that a life sentence did not mean "life" (the length of a full, natural life) and believed that the Defendant he [sic] would be released in seven years. She also said that the jury believed that Georgia law required that the Defendant receive the death penalty if he committed two or more felonies or wrong acts. Ms. Givhan stated that the jury believed that the Defendant committed kidnapping, rape, and murder, which would therefore require the death penalty.

Ms. Givhan also mentioned that the jury was surprised that Betty Joyce Holden had been selected to sit on the jury because her sister had been killed by a man who had been sentenced to life in prison, but who had been released from prison. It was after having been released from prison that this man killed Ms. Holden's sister.

Speaking of another juror, Billy Jo [sic] Newsome, Ms. Givhan mentioned how useful he had been to the jury. He was a paramedic and provided the other jurors with information regarding the forensic issues.

Marie Givhan also stated that most jurors gathered for a BBQ/reunion after the trial.

4. Juror Larry Gray was contacted, but was unable to schedule a time for an interview prior to the [state habeas corpus] Court's directive concerning contacting jurors.

5. Juror Betty Joyce Holden was contacted but refused to talk about the trial.

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6. Juror Mary Jo Hooper was contacted, was hostile and refused to talk about the trial.

7. Juror David Grant Humphrey was contacted. He stated that he recalled seeing the judge at the restaurant during the sequestration. He said that the judge may have walked by and may have spoken to the jury.

Mr. Humphrey stated that it was his understanding that during the trial the judge told the jury that in Georgia if the defendant is convicted of two or more capital offenses then he/she must be given the death penalty.

8. Juror Monica Moore was contacted, and stated, with respect to sentencing the Defendant, that she was told that life meant only seven years.

9. Juror Billy Joe Newsome was contacted, but stated that he did not want to talk about the case with anyone other than other jurors.

10. Juror Franklin Price was contacted at his home. Mr. Price's wife answered the door, was informed of the purpose of the visit, closed the door and walked away for a moment. Through the glass door, Mrs. Price was seen conferring with a man. After this conference, Mrs. Price returned to the door, mumbled something, nodded her head "no" and slammed and bolted the door.

11. Juror Paul Mayson Smith was contacted. He remembered discussion about giving a chocolate penis to the judge. At some point after the trial, Mr. Smith attended a reunion with other jurors. He stated that a female, middle aged bailiff from the trial attended the dinner.

12. Brenda Rolfe, the court reporter for the trial of State of Georgia v. Marcus Wellons in the Superior Court of Cobb County, was contacted. Ms. Rolfe worked as a court reporter in the courtroom of Judge Mary Staley in Magistrate Court, State Court, and Superior Court.

Ms. Rolfe stated that shortly after Judge Staley sentenced Mr. Wellons to death in accordance with the jury's verdict, while gathering her

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equipment, she saw Judge Staley and her bailiff, Loretta Perry, in the courtroom with large chunks of chocolate in the shapes of a penis and breasts. Judge Staley and Ms. Perry stated that the penis and breasts had been given to them by the jury. Judge Staley laughed about the penis and breasts.

Ms. Rolfe stated that many people were in the courtroom at the time of this incident. She also stated that she does not know whether Judge Staley talked to the jurors about the penis and the breasts. Ms. Rolfe did not know if anyone from the District Attorney's office was in the courtroom at the time.

Loretta Perry and the Wellons Jury

Ms. Rolfe stated that Loretta Perry spent a great deal of time with the Wellons jury and frequently ate dinner with them. She accompanied them to the hotel nightly, but did not stay there.

Judge Staley's Bailiffs

Ms. Rolfe stated that Judge Staley's bailiffs, Russ Dalton, Paul Clark and Loretta Perry work directly for Judge Staley and are not affiliated with the Cobb County Sheriff's Department.

Paul Clark, Judge Staley's father-in-law, began working for Judge Staley the day she took the bench in magistrate court and continued working with Judge Staley in state court and superior court. Loretta Perry began working for Judge Staley several months after Paul Clark began working for her. Russ Dalton began working for Judge Staley in state court. According to Mr. [sic] Rolfe, the arrangement between Paul Clark and Judge Staley violated Cobb County's anti-nepotism policy.

[Petr. Exh. 1 at bates 882-87].

The foregoing represents everything that Petitioner has learned about his misconduct claims, and although the information is provided in the form of an

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unsworn proffer, for the purpose of this discussion, this Court will accept it as evidence of what occurred.

Having reviewed Petitioner's assertions of judicial, juror, and bailiff misconduct, this Court finds that the claims do not entitle Petitioner to relief. The Sixth Amendment, by way of the Fourteenth Amendment, guarantees state criminal defendants an impartial jury. Morgan v. Illinois, 504 U.S. 719, 726 (1992). An impartial jury is a jury that determines guilt or innocence on the basis of the judge's instructions and the evidence introduced at trial, as distinct from extraneous sources of decision. Patton v. Yount, 467 U.S. 1025, 1037 n. 12 (1984); Irvin v. Dowd, 366 U.S. 717, 721-23 (1961). However, the Constitution "does not require a new trial every time a juror has been placed in a potentially compromising situation . . . [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." Smith v. Phillips, 455 U.S. 209, 217 (1982).

Moreover, "long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." Tanner v. United States, 483 U.S. 107, 127 (1987). For a variety of reasons, courts have consistently resisted efforts at "any post-verdict inquiry into a juror's state of mind." United States v. Dioguardi, 492 F.2d 70, 79 (2d Cir. 1974).

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> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.

Tanner, 483 U.S. at 120.

Even in the face of allegations that a juror was intoxicated or mentally incompetent, courts have refused to make further inquiry. See id. at 119.

The avenues of inquiry in determining whether misconduct with respect to a jury has occurred are determining if either (1) extraneous, prejudicial information was improperly supplied to the jury or (2) prejudicial influence or coercion from outside the jury was improperly brought to bear upon any juror. Fullwood v. Lee, 290 F.3d 663, 680 (4th Cir. 2002).

Petitioner's assertion that the trial judge wept during the penalty phase does not entitle Petitioner to relief because he has presented no evidence that the display of emotion affected the outcome of the trial. Petitioner couches this claim in terms of ineffective assistance of appellate counsel for appellate counsel's failure to fully develop this claim. However, Petitioner still has not developed the record. There is no indication that the jurors were aware of or influenced by the judge's display of emotion.

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Accepting Petitioner's assertion as true, ideally, the trial judge should have avoided such a display. However,

> [w]hile a judge is required to rule impartially, he or she should not be expected to be devoid of any human emotion. "Judges, while expected to possess more than the average amount of self-restraint, are still only human." United States v. Weiss, 491 F.2d 460, 468 (2d Cir.), cert. denied, 419 U.S. 833 (1974). "Judges are not required to sit stone-faced and erect at all times and to refrain from reacting to an event at which they are presiding." Lamborn v. Dittmer, 726 F. Supp. 510, 517 (S.D.N.Y.1989). See David Margolick, *At the Bar: Conspicuous Compassion Does Not Equal Bias*, N.Y. Times, May 21, 1993 at B9 (describing how an Indiana appeals court rejected a disqualification argument that was based on the fact that the judge cried after hearing a woman who was brutally raped and beaten show forgiveness and compassion toward her attacker on the witness stand).

Bilello v. Abbott Laboratories, 825 F. Supp. 475, 480 (E.D.N.Y. 1993).

Petitioner has failed to cite to, and this Court cannot independently find, any legal support for the proposition that it is plain error to fail to grant a new trial (or take other corrective measures) when a judge has wept during a jury trial. Conceivably, a violation of constitutional dimensions could be established in exceptional situations where, for example, a judge cries uncontrollably for an extended period. However, Petitioner has failed to develop a record that indicates that something so extreme occurred.

In summary, this Court concludes that the judge's purported display of emotion during the penalty phase does not entitle him to relief.

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Regarding the judge's stopping by the restaurant where the jurors were having dinner, there is no indication that anything improper occurred. Although evidence of communications outside the presence of defendant and his counsel between the judge and jury during deliberations concerning the case on trial are presumptively prejudicial, United States ex rel. Tobe v. Bensinger, 492 F.2d 232, 238 (7th Cir. 1974) (citing Remmer v. United States, 347 U.S. 227, 229 (1954)), Petitioner has presented not even the suggestion that the purported communication concerned the criminal case. Petitioner does not, therefore, enjoy a presumption of impropriety regarding the restaurant encounter between the judge and jury and thus bears the burden of establishing that he is entitled to relief.

A judge who, upon passing a juror or group of jurors in the hallway of a courthouse, says hello and inquires as to the juror's well being, has done nothing to prejudice one party or the other. Rushen v. Spain, 464 U.S. 114, 118-19 (1983) ("There is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial."); id. at 119 (ex parte communication between judge and jury need be disclosed to counsel only when that communication "relates to some aspect of the trial"). Equally, the judge presiding over Petitioner's trial was permitted to stick her head into the room where the jurors were having dinner to

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inquire as to whether they were enjoying their meal. Petitioner's attorneys asked the jurors about the incident, and nothing that Petitioner has presented provides even the slightest indication that anything more than a simple greeting occurred. In short, Petitioner has failed to present any evidence that might tend to demonstrate that the incident was anything more than an innocent encounter, and he is therefore not entitled to relief on this claim.

Turning now to the inappropriate gifts, this Court acknowledges, for the purposes of this discussion, that the jurors' act of sending the judge and bailiff chocolate representations of a penis and/or a woman's breasts constitutes an unusual display of poor taste in the context of a proceeding so grave as a capital trial. However, the act of making the gifts, standing alone, simply fails to demonstrate undue bias on the part of the jury or undue influence on the jury by the judge.

Petitioner's claim regarding the inappropriate gifts is not the typical assertion of juror misconduct such as an allegation that a juror lied during voir dire, considered extrinsic evidence, discussed the case with an outsider, or visited the scene of the crime on his or her own. The fact that a juror or a group of jurors gave an inappropriate gift to the trial judge does not lead to a conclusion that extraneous, prejudicial information was improperly supplied to the jury or that prejudicial

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influence or coercion from outside the jury was improperly brought to bear upon any juror.

Petitioner argues that the gifts were racist in nature, possibly implying indirectly that the jurors involved lied during voir dire. However, the sole indication of a racist inference with respect to the gifts is the fact that the anatomical representations were made of chocolate. However, many items are fashioned out of chocolate without creating racial overtones, and there is nothing about the inappropriate gifts which indicates an implied or overt racist message. In other words, the inappropriate gifts were not inherently racist items, and standing alone in the absence of any other form of racist behavior, the fact of the inappropriate gifts does not clearly demonstrate racial bias. While the jurors who gave the gifts to the judge and bailiff could possibly have had racist intentions, it is equally possible that they never made a racial connection between the gifts and Petitioner.

Petitioner further argues that the gifts indicate that an inappropriate relationship existed between the judge, the bailiff, and the jury, arguing that only under such a relationship would the jurors have believed that the gifts were appropriate. However, no further evidence has been presented to demonstrate an inappropriate relationship, the absence of which could just as easily indicate that the jurors involved in making the gifts had an odd sense of humor or acted on some odd, ill-considered impulse.

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Additionally, even if we accept Petitioner's argument that the inappropriate gifts were the result of an improper relationship between the judge and the jury, Petitioner has failed to establish how the inappropriate relationship resulted in prejudicial influence or coercion or caused the jurors to consider extrinsic evidence.

The jury consisted of twelve individuals. Many of those individuals admitted to counsel for Petitioner that they knew about the inappropriate gifts, but not one of the jurors voiced concern that other jurors were racist or that other jurors failed to approach their duties with the appropriate level of serious-mindedness. One of the checks on the jury system is that twelve strangers are assembled that can report to the judge regarding the possible misbehavior of other jurors. Tanner, 483 U.S. at 127; see, e.g., United States v. Spano, 421 F.3d 599, 605 (7th Cir. 2005); United States v. Rocks, 481 F.2d 112 (4th Cir. 1973). This Court has no reason to conclude that this component of the jury system failed to work in Petitioner's trial – at least some of these individuals who served on a death penalty jury would have been sufficiently earnest in their approach to their duties to report any serious breach of behavior such as an overt expression of racism by a fellow juror.

In summary, although the gifts given to the judge and bailiff were inappropriate given the situation, this Court must conclude that those gifts do not establish a violation of Petitioner's Fourteenth Amendment right to a fair and impartial jury.

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2. Bailiff Misconduct

Petitioner's sole claim of bailiff misconduct arises out of the fact that the bailiff received the gift of a pair of chocolate breasts from the jurors and that the bailiff attended a reunion of the jurors sometime after the conclusion of the trial. These assertions fail to demonstrate that the bailiff engaged in misconduct. A bailiff engages in misconduct where he or she improperly influences members of the jury or provides to them prejudicial information or evidence about the case. E.g. Parker v. Gladden, 385 U.S. 363 (1966) (holding that statements of bailiff to certain jurors that defendant was a wicked fellow, that he was guilty, and that if there was anything wrong in finding defendant guilty, Supreme Court would correct it, violated command of Sixth Amendment).

Petitioner has provided no information that would tend to demonstrate that the bailiff in question was anything more than a passive recipient of the inappropriate gift. The bailiff in question, in addition to the normal duties of ushering the jurors into and out of the courtroom, apparently accompanied the jurors to their hotel each night and was with them for some meals. Under such proximity, it is not unusual that a social relationship developed between the jurors and the bailiff. Indeed, "the continuous and intimate association throughout a . . . trial" between the bailiff and the jury where the bailiff serves as jury's "official guardian[] during the entire period of the trial" has

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been recognized by the Supreme Court as inherent in any jury trial. Turner v. Louisiana, 379 U.S. 466, 473-74 (1965). In Turner, the Supreme Court held, inter alia, that the typically close relationship between a bailiff and a jury in a criminal trial prevented the bailiff from being a prosecution witness in the trial. Id. Accordingly, this Court finds that the fact that a social relationship may have developed between a bailiff and the jury is not an extraordinary event, and Petitioner is thus not entitled to relief on his claim of bailiff misconduct.

3. The Sabel Ruling

According to the Georgia Supreme Court,

> In keeping with our opinion in Sabel v. State, 248 Ga. 10, 18, 282 S.E.2d 61 (1981), the trial court ordered [Petitioner] to disclose before trial the identities and reports of all experts consulted by the defense, whether or not those experts would be called to testify. Since the date of trial, we held in Rower v. State, 443 S.E.2d 839 (Ga. 1994), that the state is only entitled to discover those scientific reports which the defense intends to use at trial. Although Rower was decided after this case was tried, [Petitioner]'s appeal was "in the pipeline," so the Rower rule applies, and there was error. See Thornton v. State, 264 Ga. 563, 574, 449 S.E.2d 98 (1994). The question, therefore, is whether under the facts of this case, the error was harmful.
>
> The state correctly notes that the defense in fact made no disclosures incompatible with the ruling in Rower. The defense disclosed no reports of non-testifying experts. Only one non-testifying expert was even identified, and he was never mentioned at trial.

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Nevertheless, [Petitioner] contends that he was seriously harmed by the trial court's ruling. He contends that the ruling chilled his ability to consult with mental health experts, forcing him to choose blindly between unacceptable alternatives. On the one hand, he could cooperate with an expert assessment and risk both having to disclose an unfavorable evaluation and indirect disclosure by the expert of his confidential communications about the murder. On the other hand, he could decline to cooperate with experts and risk foregoing the presentation of a viable insanity or mental health defense. [Petitioner] repeatedly urged the trial court to reverse its ruling until shortly before trial, when he finally decided to cooperate with his expert psychologist, psychiatrist and sociologist, short of discussing the murder itself, and to present a defense of insanity or mental illness. At that point, he contends that he did not have enough time to effectively prepare his mental health evidence in defense or in mitigation. He further contends that he was left without time to evaluate the viability of those defenses as contrasted with a defense of actual innocence or insufficient evidence. Finally, he contends that he suffered unfairly from his psychologist's failure to prepare a report on short notice, because at trial the state portrayed the failure to prepare a report as an effort to conceal the truth.

A thorough review of the record on appeal convinces us that [Petitioner]'s contentions have no merit. [Petitioner] presented testimony from 17 witnesses in mitigation. Included among them were lay witnesses who testified regarding the abuse suffered by [Petitioner]'s family, and most notably by [Petitioner] himself, at the hands of [Petitioner]'s father. They also testified to some degree of substance use or abuse by [Petitioner]. An expert sociologist testified about the typical effects of an abusive childhood. She then testified regarding her compilation of [Petitioner]'s family history through interviews with testifying witnesses and other neighbors and relatives. Finally, [Petitioner]'s expert psychologist, who testified that he was directed by defense counsel not to reduce his report to writing, offered his conclusions based on his testing of and conversations with [Petitioner] and on the written report of the sociologist. The psychologist testified that [Petitioner] suffers from post-traumatic stress, a mixed personality disorder and substance abuse. He testified that [Petitioner] does not

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> suffer from organic brain damage and is not psychotic. He further acknowledged in his testimony that [Petitioner] was also evaluated by a court-appointed psychiatrist, who concluded that [Petitioner] is an intelligent, well-educated man with a significant personality disorder but no brain damage and no psychosis.
>
> Although [Petitioner] presented no expert testimony in the guilt-innocence phase of trial, the evidence as a whole demonstrates that his defenses of insanity and mental illness were simply not viable. See Bright v. State, 265 Ga. 265, 273-274, 455 S.E.2d 37 (1995) (greater showing of mental health problems than in present case held inadequate even to entitle defendant to expert assistance in guilt-innocence phase). Nor did [Petitioner] have a viable alternate defense of actual innocence or insufficient evidence. The evidence of guilt was overwhelming. Therefore, the error, though it might well have initially had a chilling effect on consultation with experts, was ultimately harmless. The chilling effect could have been and apparently was cured after [Petitioner] decided to raise the insanity defense. His counsel made an intelligent, strategic choice not to contest [Petitioner]'s participation in the crimes, to merely introduce the idea of mental illness in the guilt-innocence phase of trial, and then to bring every effort to bear in mitigation.

Wellons, 463 S.E.2d at 875-77.

As is noted by the state court, Petitioner's trial counsel sought repeatedly to prevail upon the trial court to reverse its Sabel ruling. When the trial court refused, trial counsel opted to avoid contacting psychological experts, fearing that an expert might reach a conclusion prejudicial to Petitioner's defense, and counsel would then have to turn this information over to prosecutors. Petitioner now raises three claims regarding the trial court's Sabel ruling: (1) that the ruling itself deprived Petitioner of

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a fair trial, (2) that Petitioner's trial counsel was ineffective in his reaction to the Sabel ruling by failing to consult sufficiently with psychological experts, and (3) that the Sabel ruling had the effect of depriving Petitioner of effective counsel by forcing trial counsel to choose between two unappealing courses of action: either consult with experts and turn over possibly prejudicial evidence or proceed without the assistance of experts.

At the outset, this Court notes that the trial court's application of Sabel somewhat perverted the holding in that action. In Sabel, James Russell Sabel, an avowed communist, had been convicted of spray-painting communist slogans in thirty-seven locations on the state buildings that surround the state capitol in Atlanta. Sabel, 282 S.E.2d at 63. Sabel received a six-month sentence. Id. at 64. Part of the evidence used against Sabel was the fact that he had paint stains on his hands, and an expert testified that the paint on Sabel's hands and the paint on the state buildings "'could have had a common origin.'" Id. at 67. In his appeal, the Georgia Supreme Court granted Sabel a new trial because the trial court had refused to permit Sabel to hire an expert, at Sabel's expense, to do an independent test comparison of the paint from Sabel's hands and the buildings. The court reasoned that, because the evidence at issue was both "critical" to the question of guilt and "whose nature is subject to

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varying expert opinion," Sabel was entitled to hire an expert to examine the evidence in the state's possession. Id. at 68.

However, the Georgia Supreme Court recognized that its ruling had certain potential drawbacks. Because the evidence was in the state's possession, the state would incur at least some expense and/or inconvenience in permitting an outside expert to do the testing. Additionally, there were concerns that testing by an outside expert risked tainting the evidence. In response to these concerns, the court imposed certain safeguards:

> The trial court may require that the defendant's expert be qualified as such in advance of testing and agree to be available as a witness on the date or dates on which the trial is scheduled. Moreover, in view of the right of a defendant in a criminal case to obtain copies of scientific reports (Ga. L. 1980, p. 1388; Code Ann. § 27-1303), we find that requiring the report of the defendant's expert to be reduced to writing and made available to the state will further the search for the truth. If the defendant does not call the expert as a witness, the state may call the defendant's expert without adding his or her name to the list of witnesses, or may argue to the jury that the defendant would have called the expert had the result of the testing been favorable to the defendant. Other safeguards appropriate to the circumstances of the case may be imposed by the trial court.

Id. at 68-69.

In Petitioner's case, the trial court extended the Sabel holding to include evidence – Petitioner's psychological state – that was not in the state's possession in the same manner that a piece of physical evidence such as a murder weapon would be,

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and the state had no intent of presenting this evidence in its case against Petitioner. Therefore, there was no issue of cost or inconvenience to the state and no risk of tainting evidence. This Court recognizes the potential chilling effect of the Sabel ruling in this context, and agrees with the Georgia Supreme Court that the trial court erred by applying the rule to require Petitioner's trial attorney to hand over all information about potential experts. However, this Court further agrees with the state court in concluding that the error was harmless.

In Mobley v. Head, 267 F.3d 1312, 1316 (11th Cir. 2001), the Eleventh Circuit confronted a habeas corpus death penalty action that raised a similar claim. Mobley, the petitioner in that action, argued that he was entitled to relief "because his right to due process was violated by the trial court's entry of a Sabel order." Id. at 1316. After Mobley's trial, but prior to the filing of his direct appeal, the Georgia Supreme Court overturned Sabel in its Rower decision.

On direct appeal, "the Georgia Supreme Court ruled that entry of the Sabel order was error but that the error was harmless because 'Mobley does not assert, nor does the record reflect, that Mobley was required to provide or did in fact provide the state with any scientific reports in violation of the Rower rule.'" Id. (quoting Mobley v. State, 455 S.E.2d 61, 66 (Ga. 1995)). The Eleventh Circuit determined that Mobley's claim of a "chilling effect" was procedurally barred because he had not

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raised the claim in his appeal, but further held in the alternative that any error was harmless because Mobley's trial counsel did not seek expert assistance in part because Mobley and his family had denied to counsel that Mobley undergone any childhood abuse or trauma and not solely because of the chilling effect of the Sabel ruling.

Accordingly, under the Eleventh Circuit's Mobley decision, the proper standard to apply to Petitioner's chilling effect claim is harmless error analysis. The Georgia Supreme Court correctly identified and applied that standard to Petitioner's Sabel claim, and the state court's conclusion was not based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Petitioner argues that the Georgia Supreme Court's conclusion should not enjoy deference under § 2254(d) because the "Sabel doctrine was absolutely inconsistent with clear precedent of the United States Supreme Court . . . . [and] was also inconsistent with the controlling Supreme Court case law regarding discovery." [Doc. 60 at 16]. In support of this proposition, Petitioner cited to Wardius v. Oregon, 412 U.S. 470 (1973). In Wardius, the Supreme Court invalidated an Oregon rule that required the defense to provide the state with prior notice of an alibi defense. Id. at 471-72. However, the Court specifically premised its holding on the fact that the rule did not allow for reciprocal discovery rights for the criminal defendant. Id. The Court

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noted that in a previous case, Williams v. Florida, 399 U.S. 78 (1970), the Court upheld a Florida rule that required "criminal defendants intending to rely on an alibi defense to notify the prosecution of the place at which they claimed to be at the time in question, and of the names and addresses of witnesses they intended to call in support of the alibi." Wardius, 412 U.S. at 471. The Florida rule was upheld because it provided the criminal defendants with reciprocal discovery rights. Id.

In Sabel, the Georgia Supreme Court noted that criminal defendants in Georgia are entitled "to obtain copies of scientific reports" prepared by state experts. Sabel, 282 S.E.2d at 68. Clearly, Petitioner enjoyed reciprocal discovery rights. Petitioner's reliance on Wardius is inapposite, and he has failed to demonstrate that the Court should not defer to the state court's conclusions.

As is noted by every court that has reviewed this case, and as is noted above by this Court, the evidence of Petitioner's guilt and criminal responsibility presented during the guilt/innocense phase of the trial was incontrovertible. The Sabel ruling did not cause or enhance the strength of that evidence and its absence could not have changed the outcome of the trial. Accordingly, this Court finds that the trial court's error in entering the Sabel ruling was harmless with respect to the guilt/innocence phase of the trial.

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With respect to the penalty phase of the trial, this Court likewise finds that any error committed by the trial court was harmless. As the Georgia Supreme Court concluded and is discussed in much greater detail below in reference to Petitioner's claims of ineffective assistance of counsel, trial counsel was able to present sufficient mitigating evidence of Petitioner's family history of abuse and mental state during the penalty phase, and he has failed to demonstrate that the additional evidence that he has since amassed undermines this Court's confidence in the outcome of that proceeding. See Davis v. Singletary, 119 F.3d 1471, 1475 (11th Cir. 1997) ("[T]he mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."). Accordingly, Petitioner is not entitled to relief with respect to his claims regarding the trial court's Sabel ruling.

4. Ineffective Assistance of Trial Counsel

The standard for evaluating claims of ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984). The analysis is two-pronged, and the court may "dispose of the ineffectiveness claim on either of its two grounds." Atkins v. Singletary, 965 F.2d 952, 959 (11th Cir. 1992); see Strickland, 466 U.S. at 697 ("There is no reason for a court deciding an ineffectiveness claim . . . to address

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both components of the inquiry if the defendant makes an insufficient showing on one.").

A petitioner must first show that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. The court must be "highly deferential," and must "indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. Furthermore, "[s]trategic decisions will amount to ineffective assistance only if so patently unreasonable that no competent attorney would have chosen them." Kelly v. United States, 820 F.2d 1173, 1176 (11th Cir. 1987). In order to meet the second prong of the test, Petitioner must also demonstrate that counsel's unreasonable acts or omissions prejudiced him. Strickland, 466 U.S. at 694. That is, Petitioner "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Petitioner raised his ineffective assistance claims in his state habeas corpus petition. The state habeas corpus court first identified the proper standard for evaluating such claims under Strickland.

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A claim of ineffective assistance of counsel is embedded in the right to counsel set forth in the Sixth Amendment to the United States Constitution and Article I, Section I of the Georgia Constitution. In Strickland v. Washington, 466 U.S. 668, 687 (1984), the United States Supreme Court established a two-pronged inquiry for reviewing such claims of ineffective assistance of counsel.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

In Smith v. Francis, 253 Ga. 782, 783 (1985), the Supreme Court of Georgia explained that the "performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances . . . from counsel's perspective at the time" and not with the benefit of hindsight. To make a showing of prejudice under the second prong of the Strickland standard, the defendant must prove that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Smith, 253 Ga. at 783-84.

The Supreme Court of Georgia has held that

> Judicial scrutiny of counsel's performance must be highly deferential, indulging a strong presumption that counsel's conduct falls within the wide range of reasonable professional representation . . . . Counsel is also presumed to have rendered adequate assistance and made all

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significant decisions in the exercise of reasonable professional judgment.

Zant v. Moon, 264 Ga. at 93, 97, U.S. cert. denied (1994)(citations omitted).

[Resp. Exh. 64 at 23-24].

Having identified the proper standard for evaluating a claim of ineffective assistance of counsel, the state court made the following findings of fact regarding Petitioner's counsel:

> [Petitioner] was represented at trial and on appeal by Derek Jones and Ken Croy, with Mr. Jones acting as lead counsel and Mr. Croy acting as second chair. (Hab. 13-14). Prior to his representation of Petitioner, Mr. Jones had been involved in the practice of criminal law in numerous capacities. (Hab. 10-12.) While working as an investigator for two years, Mr. Jones investigated two death penalty cases. (Hab. 10-12.) He served as public defender for the Ware Judicial Circuit for one and one-half years and worked with the Fulton County Public Defender's Office for five years. (Hab. 10-12.) At the time of his being appointed to represent Petitioner in October 1989, Mr. Jones had been in private practice for two years with his focus being that of criminal law. (Hab. 11-13.) Mr. Jones had prior experience with death penalty trials. (Hab. 12-13.) He served as an investigator in one, as an investigator and counsel in one, as co-counsel in six, and as lead counsel in one, which did not go to trial. (Hab. 12-13.)
>
> Mr. Jones' co-counsel, Mr. Croy, likewise had experience in the practice of criminal law. (Hab. 148-49.) Prior to Petitioner's trial, Mr. Croy had practiced criminal law for thirteen years and was involved in seven death penalty trials, two of which he sat as lead counsel. (Hab. 149-50.)
>
> At the evidentiary hearing, Mr. Jones testified that based on Petitioner's background, it was his opinion that expert assistance would be needed to investigate and represent Petitioner. (Hab. 20.) Accordingly, Mr.

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Jones filed an ex parte Brooks motion in which he sought to obtain funds to facilitate his use of experts on behalf of Petitioner. (Hab. 20.) Upon learning, however, that the State intended to obtain access to the information concerning Petitioner's experts, on March 21, 1991, Mr. Jones filed a Motion That Defense Not Be Required to Reveal Identity of Expert Witnesses and Turn Over Reports. (Hab. 21-22.) Mr. Jones later filed a brief in support of that motion. (Hab. 22.)

Judge Brantley denied Petitioner's motion, however, and ruled that the identities and reports of defense experts were discoverable by the State. (Id. at 23.) In response to the ruling, pursuant to the Unified Appeal Procedure, O.C.G.A. § 17-10-36, Mr. Jones filed a request for immediate review of the ruling, which was subsequently denied by Judge Brantley. (Hab. 23-24.)

Mr. Jones did, however, contact several experts in an effort to establish a defense for Petitioner. (Hab. 24-25.) Mr. Jones contacted Dr. Barry Scanlon, a psychiatrist, Dr. Marti Loring, a sociologist, and Dr. Stephen O'Hagan, a psychologist, to consult with Petitioner and his counsel. (Hab. 24, 26.) In the meantime, however, Mr. Jones notified these experts that the Sabel issue was still being litigated, as Judge Staley had now replaced Judge Brantley. (Hab. 26.) Mr. Jones, therefore, placed restrictions on the experts' evaluation of Petitioner until resolution of the issue regarding use of experts. (Hab. 28.)

On February 26, 1993, Mr. Jones filed a Motion for Reconsideration of Judge Brantley's ruling accompanied by an affidavit from Dr. Scanlon stating that Dr. Scanlon was unable to complete his evaluation due to the restrictions placed upon him by Mr. Jones. (Hab. 28; Pet'r Ex. 67.) Judge Staley ruled on the motion sometime in late April 1993. (Hab. 29.) Subsequent to the ruling, Mr. Jones wrote a letter to Mr. Jack Mallard, Chief Assistant District Attorney for Cobb County, indicating Mr. Jones' intention to seek reconsideration of Judge Staley's ruling. (Hab. 29.) On June 1, 1993, Judge Staley denied Petitioner's request and, thus, ruled that Petitioner was required to disclose the identity and the reports of any expert witnesses including those of mental health experts. (Hab. 31-32.)

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In light of the ruling, which became the "law of the case" Mr. Jones was forced to make a determination as to whether to use experts and risk providing key evidence for the State that it would not have otherwise had, or to not use experts at all. (Hab. 33-35.) Upon consideration of the matter, Mr. Jones elected to proceed with a mental health defense by having Petitioner evaluated but not allowing him to speak to his experts regarding the murder. (Hab. 34-41.)

While there was no confession from Petitioner, Mr. Jones felt that there was strong evidence against Petitioner. (Hab. 39.) In light of the Sabel ruling, Mr. Jones "tried to bring up the idea of some sort of mental health issue here and then tried to sway the jury in the penalty phase about showing what his bad childhood [was] and showing what he made of himself as a man . . . ." (Hab. 40.)

In support of a mental health defense, Petitioner was examined by Dr. Scanlon and Dr. O'Hagan. (Tr. 2981; Hab. 24-25.) Dr. Loring conducted a social history on Petitioner as well. (Hab. 25.) A court-ordered evaluation was performed by Dr. Jerold Lower who found that Petitioner was intelligent and well-educated. (Hab., Resp't Ex. 36.) Dr. Lower further found that Petitioner did not display "significant structural abnormalities" and that he answered questions in a "logical, coherent, and relevant fashion." (Hab., Resp't Ex. 36.)

During the guilt/innocence phase of the trial, Petitioner presented no expert evidence. Wellons, 266 Ga. at 82. Mr. Jones, however, called Dr. O'Hagan to testify during the penalty phase in an effort to "put something before the jury of a psychological vein to help them understand and perhaps also, to try to show that this person wasn't a predator . . . ." (Hab. at 43.) Dr. O'Hagan evaluated Petitioner based on information provided him on the medical and academic background of Petitioner. (Tr. 2981.) Upon conducting many psychological tests, Dr. O'Hagan diagnosed Petitioner with an "emerging post-traumatic stress disorder" but with no brain damage and no psychosis. (Tr. 2982-83, 3010-3011.) Prior to making his decision to call Dr. O'Hagan to testify, however, Mr. Jones had the opportunity to discuss with Dr. O'Hagan the

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results of the tests performed on Petitioner and of the evaluation in conjunction therewith. (Hab. 145-56.)

[Resp. Exh. 64 at 24-27 (footnote omitted)].

Based upon the foregoing findings of fact, the state court concluded as follows with respect to Petitioner's claims of ineffective assistance of counsel:

> Petitioner now argues before this Court that use of certain expert testimony deeming Petitioner to be insane would have assisted trial counsel in presenting an appropriate theory of defense on behalf of Petitioner and that the Sabel ruling negated any such assistance, thus, rendering trial counsel ineffective. (Br. Of Pet'r at 104-06; Hab. 47-49.) In support, Petitioner offers this Court the affidavits of Dr. George W. Woods, Jr., a psychiatrist, and Dr. Daniel H. Grant, a psychiatrist, who have both subsequently evaluated Petitioner and determined that Petitioner was, in fact, insane at the time of the offense. (Hab. 45-56, Pet'r Exs. 10, 32.) Moreover, in the evidentiary hearing before this Court, Mr. Jones testified that the information subsequently provided by Drs. Woods and Grant would, indeed, have assisted him in representing Petitioner. (Hab. 48-49.)
>
> The Eleventh Circuit Court of Appeals has held that "'[t]he mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel.'" Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987), cert. denied, 487 U.S. 1241 (1988)(citations omitted) Further, the Eleventh Circuit notes that
>
> > Once we conclude that declining to investigate further was a reasonable act, we do not look to see what a further investigation would have produced. Nor do we need to decide whether the information that would have resulted from further investigation would have necessarily been used at trial by every reasonable lawyer who was armed with such information.

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Rogers v. Zant, 13 F.3d 384, 388 (11th Cir. 1994).

Under the Strickland standard

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."

Strickland, 466 U.S. at 690-91. The Eleventh Circuit has set forth guidelines for evaluating a claim of ineffective assistance of counsel as follows

> The steps for a proper analysis of an ineffective assistance of counsel claim in a case such as this are well established .... [C]ounsel is deemed to have been ineffective when his acts or omissions were outside the wide range of professional competent assistance. An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence .... First, it must be determined whether a reasonable investigation should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a tactical choice by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end .... If, however, the failure to present the mitigating evidence was an oversight, and not a tactical decision, then a harmlessness review must be made to determine if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Thus, it must be determined that defendant suffered actual prejudice due to the ineffectiveness of his trial counsel before relief will be granted.

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Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988) (citations omitted).

The evidence in the within Petition is clear that trial counsel did, indeed, conduct an investigation into Petitioner's background by having Petitioner evaluated by mental health experts. Nevertheless, trial counsel chose to restrict the scope of any such evaluation of Petitioner due to the Sabel ruling. While it is apparent through the testimony of Mr. Jones that he felt that the Sabel ruling "prevented [him] from doing his job," (Hab. 50), Mr. Jones testified that he did everything he could to "fight" the Sabel ruling and that he was "still mad about it." (Hab. 146.) The record is completely devoid of any evidence to suggest that trial counsel acted ineffectively in opposing the Sabel ruling or in acting in accordance with it during their representation of Petitioner.

In the within Petition, this Court cannot relitigate the correctness of the trial court's ruling, as the same has been decided by the Supreme Court on Petitioner's direct appeal. Therefore, in light of the Sabel ruling by the trial court and based on trial counsel's testimony during the evidentiary hearing, this Court must conclude that trial counsel made an informed tactical decision to have Petitioner's evaluations restricted as to their scope such that any evaluations would not produce evidence which would assist the State in its prosecution of Petitioner. Petitioner has failed to make the required showing as to ineffective assistance under the first prong of the Strickland standard which requires petitioner to show that trial counsel's performance was deficient in light of the Sabel ruling.

Petitioner also suggests that trial counsel failed to conduct an adequate investigation in that they failed to obtain certain of Petitioner's background records which would have supported a defense of mental illness. (Am. App. at ¶¶ 7-10 - 7-19, 7-26.) At the evidentiary hearing before this Court, Mr. Jones testified that he interviewed approximately twenty to thirty witnesses and traveled to Cordele and Miami on numerous occasions in an attempt to gather mitigating evidence. (Hab. 58-59.) Mr. Jones spoke with various family members who informed him of Petitioner's background of being abused and of his apparent

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problem with his use of alcohol. (Hab. 73-105.) Through his investigation, Mr. Jones became aware of Petitioner's criminal background. (Hab. 126.) Mr. Jones compiled notes of his discussions with witnesses for his file in preparation for trial. (Hab. 60-134.)

Despite Petitioner's claims to the contrary, there is no evidence to suggest that Petitioner's trial counsel failed to conduct adequate investigations with respect to Petitioner's background and history. Instead, the record reflects that the actions of Mr. Jones and Mr. Croy are consistent with those that would be taken by a reasonable attorney under similar circumstances. Therefore, Petitioner's claims as to trial counsel's failure to conduct adequate investigations are without merit.

. . . .

Based on the foregoing, this Court concludes that because Petitioner has failed to make the requisite showing under the deficient-performance prong of the Strickland standard, he is not entitled to habeas corpus relief, as Petitioner is required to prove both deficient performance of trial counsel and prejudice that resulted therefrom. Nevertheless, this Court will review Petitioner's claims under the second prong of Strickland.

Under the prejudice prong of Strickland, Petitioner must make a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. In other words, Petitioner must offer evidence to prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Smith, 253 Ga. at 783-84. "Regarding death penalties, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 783-84.

It is clear from the record that Petitioner's claims of prejudice, which he alleges resulted from his trial counsel's defective performance, arise out of his allegation that the Sabel ruling was improper. Based on Elrod v.

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Ault, 231 Ga. at 750, and its progeny, this Court cannot relitigate that which has already been decided on direct appeal. Therefore, the question this Court must resolve under the prejudice prong is whether the actions of Petitioner's counsel, in light of the Sabel ruling, prejudiced the outcome of Petitioner's trial.

Petitioner's counsel testified that he made decisions "based upon the position [he] was in at the time." (Hab. 51.) Further, Mr. Jones testified that he "believe[s] in trying to resolve these things at trial . . . [and that] at trial you get your best shot." (Hab. 137-38.) It is the conclusion of this Court that Petitioner's trial counsel advocated on behalf of Petitioner in a manner consistent with that of a reasonable attorney under the same circumstances possessing the same knowledge as that of Mr. Jones and Mr. Croy. There is no evidence to suggest that the trial counsel acted in such a manner as to deprive Petitioner of a fair trial. Instead, the evidence is quite clear that Mr. Jones and Mr. Croy made tactical decisions based on the Sabel ruling that was in effect and that such decisions were appropriate based on the facts and circumstances surrounding the offense with which Petitioner had been accused. Therefore, it cannot be said that trial counsel's actions, in any way, prejudiced Petitioner.

Likewise, the Supreme Court, on direct appeal, determined that "[a]lthough [Petitioner] presented no expert testimony in the guilt-innocence phase of trial, the evidence as a whole demonstrates that his defenses of insanity and mental illness were simply not viable." Wellons, 266 Ga. at 82. Further, the Court held that "the error, though it might well have initially had a chilling effect on consultation with experts, was ultimately harmless . . . [and that such] chilling effect could have been and apparently was cured after [Petitioner] decided to raise the insanity defense." Id.

In accordance with the Strickland standard that was later adopted by the Supreme Court of Georgia in Smith, this Court finds that Petitioner has failed to carry his burden under the second prong of the two-step inquiry governing ineffective assistance of counsel claims. There is no evidence

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to suggest prejudice resulting from trial counsel's actions. Petitioner's claims as to ineffective assistance of counsel are, therefore, denied.

[Resp. Exh. 64 at 27-32 (footnote omitted)].

This Court finds that the state habeas corpus court's conclusion that counsel's decision to limit the use of experts in light of the Sabel ruling was a reasonable trial strategy was not an unreasonable application of federal constitutional law. Petitioner argues, however, that the state habeas corpus court's conclusions are not entitled to § 2254(d) deference because the state court focused solely on trial counsel's strategic decision to forego a proper mental health investigation in light of the trial court's Sabel ruling. According to Petitioner, the state court failed to address Petitioner's claim that the Sabel ruling caused his counsel to be ineffective because it interfered with the ability of counsel to make independent decisions regarding the presentation of a defense – that the Sabel ruling denied Petitioner of effective counsel. [Doc. 60 at 16 (citing cases)]. Petitioner further argues that, while the state habeas corpus court focused extensively on trial counsel's strategic decision to severely limit his use of experts in light of the Sabel decision, the court did not otherwise adequately address his claims regarding trial counsel's performance. [Id. at 17]. According to Petitioner, "[w]hile it is true that counsel's hands were tied by the trial court's ruling pursuant to

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Sabel, this does not insulate him from the requirement that he actively pursue other investigative alleys." [Id.].

However, Petitioner does not adequately develop his claim that trial counsel's performance was deficient. For example, Petitioner refers in his final brief to the "wealth of mitigation evidence presented by state habeas counsel." [Doc. 60 at 17], and the "wealth of mitigating and mental health evidence presented in state habeas," [id. at 18], that was supposedly ignored by the state habeas corpus court. However, Petitioner does not identify the mitigating evidence that was not presented at the penalty phase that would have, in his opinion, changed the outcome of that proceeding. As was noted above in the discussion of Petitioner's Brady claims, it is not a duty of this Court to find the factual support for Petitioner's claims. See supra discussion at Part IV.C.1 (citing Adams v. Armontrout, 897 F.2d 332, 333-344 (8th Cir. 1990); Williams v. Kullman, 722 F.2d 1048, 1051 (2d Cir. 1983); see Rule 2, Rules Governing Section 2254 Cases (the petition must "state the facts supporting each ground")).

This Court has reviewed the affidavits that Petitioner submitted in his state habeas corpus proceeding. Those affidavits can be divided into two groups: (1) witness affidavits of Petitioner's family and acquaintances who describe Petitioner as a generally well-meaning individual but who had a very troubled upbringing,

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particularly at the hands of his father, and (2) expert affidavits of psychological specialists.

The witness affidavits generally described Petitioner's life experiences such as the highly abusive actions of Petitioner's father, Petitioner's rocky employment history, and his relationships with various individuals. The portrait that emerges from the witness affidavits is that of an intelligent but troubled man who alternatively displayed odd behaviors and a willingness to help his friends and family members.

As to the expert affidavits, Daniel H. Grant Ed. D., a licenced psychologist, provided an affidavit which described at length the battery of tests that he performed on Petitioner. Dr. Grant states his opinion that Petitioner's exposure to the physical abuse of his mother by his father caused post traumatic stress disorder and that Petitioner has brain damage from a variety of head injuries that he suffered as a child and teenager. Dr. Grant concludes:

> In summary, [Petitioner]'s behavior on August 30-31, 1989, can only be understood in the context of the other forces at work in his life. He suffers from post traumatic stress disorder, a bipolar disorder, and significant neurological impairment. His ability to relate to others, his ability to make sound judgements in stressful situations, and his ability to control his impulses, particularly when under stress were developmentally and neurologically compromised. [Petitioner]'s actions in August 1989 were thus an unfortunate expression of the volatile combination of extreme emotional distress, dissociative thoughts, hallucinations, suspiciousness, trauma, a bipolar disorder, which, by

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definition, is unpredictable and cyclical, and neurological deficits stemming from his environment and development.

[State Habeas Corpus Petr's Exh. 32 at 119].

Also among the expert affidavits is the statement of Stephen Edward O'Hagan, Ph. D., another licensed psychologist and one of the experts that testified during the penalty phase of Petitioner's trial. According to Dr. O'Hagan's affidavit, his evaluation was limited by the trial court's Sabel ruling and trial counsel's strategy in reaction to that ruling. During Dr. O'Hagan's examination, Petitioner, on advice of counsel, refused to discuss the events of the night of the murder. Dr. O'Hagan was also under significant time constraints because of the fact that trial counsel did not start the psychological evaluation until after Petitioner's trial had begun. As a result of the fact that Dr. O'Hagan was not able to ask questions about the night of the murder, he asserted that he was constrained as to his ability to properly evaluate Petitioner's capacity to form intent or distinguish between right and wrong at the time Petitioner committed his crimes. [Id. at 176]. Given what Dr. O'Hagan knew about Petitioner's "bizarre" behavior that night, it was clear that Petitioner's "mental state required in-depth analysis, but it was simply not possible." [Id.]. As to the time limitations, Dr. O'Hagan states that he had no time to "digest the raw data" of the tests

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that he had performed, and, as a result, he "gave extraordinarily conservative diagnoses." [Id.].

Dr. O'Hagan further states that if he had been able to perform a full analysis of Petitioner such as that done since the trial, Dr. O'Hagan's testimony would have been "significantly more thorough and the diagnosis different." [Id. at 178].

In a third expert affidavit, George W. Woods, Jr., M.D., a psychiatrist, provided a very lengthy analysis of Petitioner's life history and the results of his psychological tests. He concludes that Petitioner suffers from "a triad of well-documented psychiatric and neurological impairments, including Post Traumatic Stress Disorder, Bipolar I Disorder, and neurological dysfunction." [Id. at 347]. He further states that "this triad of impairments rendered [Petitioner] legally insane, in my professional opinion, at the time of the death of Ms. India Roberts." [Id.].

During the penalty phase of the trial, Petitioner's counsel called seventeen witnesses. Of those witnesses, three fact witnesses and two expert witnesses discussed Petitioner's difficult childhood and the abuse of Petitioner's father. Petitioner's brother, Charles Wellons, Jr., testified that Petitioner's father was very abusive and regularly beat Petitioner's mother and Petitioner. According to Charles Wellons, Jr., Petitioner's father beat Petitioner with whips, extensions cords, coat hangers, and such beatings were a regular occurrence. [Resp. Exh. 18 at 3052].

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Charles Wellons, Jr., further stated that the Petitioner's "life was one of terror," [id.], that Petitioner's father would take money from Petitioner's mother and would disappear for weeks, leaving the family with no money to buy food, [id. at 3053], that Petitioner's father once held a gun to Petitioner's mother's head and pulled the trigger, but the gun misfired, [id. at 3054], and that of all the kids, Petitioner's father was particularly hard on Petitioner, calling Petitioner a "black bitch," a "black dog," and asserting that Petitioner was not his son, [id. at 3059]. Petitioner's mother and Leola Jackson, a former neighbor, also testified at length and in detail about the abuse that Petitioner suffered at the hands of his father.

In Dr. O'Hagan's testimony during the penalty phase, he also testified at length about Petitioner's abusive history. He testified that, as a result of Petitioner's "history of very severe abuse he sustained as a young child," [id. at 2982], he suffered from a mixed personality disorder with paranoid and schizotypal features, [id. at 2983].

Dr. Marty Loring, a clinical social worker, also testified during the penalty phase. According to Dr. Loring, in preparing his testimony, he interviewed Petitioner's brothers, sister and mother in addition to the family's neighbors, [id. at 3141-42], and he testified about the abusive environment in which Petitioner spent his childhood. He noted that physically abused boys have problems with impulse control and in developing intimate relationships, and he discussed how Petitioner's

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dysfunctional family affected Petitioner. He further testified that when Petitioner was a child, society had not yet recognized the magnitude or prevalence of child abuse, and that often, severe family violence occurred without intervention. [Id. at 3143].

In its order denying relief, the state habeas corpus court specifically identified Dr. Woods and Dr. Grant and discussed their conclusions. Presumably, the expert testimony is thus not among the wealth of mitigating information that Petitioner claims the state court ignored. The only other mitigation evidence presented by Petitioner in his state habeas corpus hearing is the expanded record of Petitioner's abusive childhood. However, a review of the transcript of the penalty phase of the trial indicates clearly that Petitioner's trial counsel thoroughly investigated the events of Petitioner's childhood and presented ample testimony regarding that issue. Moreover, having reviewed that testimony, this Court finds that the testimony of those witnesses was credible. Charles Wellons, Jr., a Miami police officer at the time of his testimony, was a good witness and presented a compelling portrait of his early family life. In short, the jury likely believed that Petitioner had been subject to extensive abuse by his father, and they opted for a death sentence nonetheless.

More generally, this Court is bound by the state courts findings that trial counsel's investigation was sufficient; that trial counsel interviewed at least twenty witnesses and traveled to Cordele and Miami "on numerous occasions" to obtain

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mitigating evidence; that trial counsel spoke with Petitioner's family members regarding Petitioner's abusive background.

None of the additional mitigation evidence that Petitioner claims could have been presented substantially differs from the evidence actually presented so as to undermine confidence in the outcome of the penalty phase of Petitioner's trial. "It is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called, or, if they were called, had they been asked the right questions." Waters v. Thomas, 46 F.3d 1506, 1513-14 (11th Cir. 1995). "The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987).

In summary, this Court concludes that Petitioner has failed to establish that his trial counsel was ineffective given the Sabel ruling or that he was prejudiced by trial counsel's actions taken in light of the Sabel ruling.

B. Petitioner's Remaining Claims

With respect to the remainder of Petitioner's claims outside of the Three Principal Claims, Petitioner's only discussion regarding this Court's statutorily

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mandated deference to the state court's conclusions under 28 U.S.C. § 2254(d) is found in his final brief,[10] [Doc. 60], wherein he argues:

> Under 28 U.S.C. § 2254, *de novo* review of a Petitioner's habeas corpus claims is required in this Court if either the state court has not ruled on the federal constitutional merits of the claims, or if the state court's merits treatment is contrary to or an unreasonable application of federal law as established by the Supreme Court. Petitioner is entitled to *de novo* review both because, on the majority of issues, the state court simply did not rule on the federal constitutional merits of the claims. On the claims in which it did address the federal constitutional merits, the state courts' application was "contrary to and unreasonable."

[Id. at 13].

As is discussed fully above, 28 U.S.C. §§ 2254(d) and 2254(e) require this Court to defer to the state court findings and conclusions unless they were contrary to federal law or the product of an unreasonable interpretation of the facts. Indeed, given the exhaustion requirement mandated by § 2254(b)(1)(A), the § 2254(d) inquiry is the penultimate question in federal habeas corpus jurisprudence when a petitioner challenges a state court conviction. Despite that fact – and the fact that the heavy burden of § 2254(d) rests solely with Petitioner, see Woodford v. Visciotti, 537 U.S. 19, 25 (2002); Schwab v. Crosby, 451 F.3d 1308, 1329 (11th Cir. 2006); Hunter v.

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[10] Petitioner did provide an extensive argument in his final brief that this Court should not defer to the state courts' conclusions regarding the Sable ruling and the fact that trial counsel was ineffective for having failed to present mitigating psychological evidence during the penalty phase of the trial. [Doc. 60 at 15-19].

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Secretary, Dep't of Corr., 395 F.3d 1196, 1203 (11th Cir. 2005) – the foregoing passage is all Petitioner has to say regarding the issue of § 2254(d) deference with respect to his claims other than the Three Principal Claims. Petitioner argues that this Court should not defer to any of the state court conclusions but he provides not one fact or citation to the record that might support the assertion. According to Petitioner, "on the majority of issues, the state court simply did not rule on the federal constitutional merits of the claims," but he fails to identify those issues. As to the claims that Petitioner says were the subject of federal constitutional scrutiny by the state courts, the "courts' application was 'contrary to and unreasonable,'" but Petitioner again fails to identify those issues. Needless to say, Petitioner has also failed to demonstrate what was "contrary to or unreasonable" about the state courts' conclusions.

The complete absence of § 2254(d) argument by Petitioner leaves this Court in a quandary. Because Petitioner has failed to demonstrate (or, in most cases, even argue) cause and prejudice to excuse his procedurally barred claims, this Court can review only those claims raised by Petitioner in state court. As such, § 2254(d) deference is the central issue for review. Because Petitioner has failed to meet his burden on that issue, this Court must conclude that Petitioner is not entitled to relief.

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However, because of the gravity of the matter, this Court will briefly review Petitioner's claims.

1. Ground 2

In his Ground 2, Petitioner claims that his death sentence was imposed based on his race. Petitioner raised this claim in his appeal, and the Georgia Supreme Court held:

> There is no merit to [Petitioner's] contention that the death penalty scheme is unconstitutional because the district attorney has unfettered discretion. McMichen v. State, 265 Ga. 598, 611, 458 S.E.2d 833 (1995). The law authorized the state to seek the death penalty in this case, and [Petitioner's] claim that the decision to do so was racially motivated is purely speculative, particularly given that the victim was also African American. See Rower v. State, 264 Ga. 323, 323, 443 S.E.2d 839 (1994).

Wellons, 463 S.E.2d at 882.

In support of his assertion that the prosecution's decision to seek – and the jury's decision to impose – the death penalty was racially motivated, Petitioner points to the following facts: (1) the prosecutors exercised his peremptory strikes to remove jurors based upon their race, and (2) the jurors gave the judge a chocolate penis and a bailiff a pair of chocolate breasts. In order to establish a claim of selective prosecution, Petitioner must demonstrate a discriminatory effect that was motivated

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by a discriminatory purpose. To establish a discriminatory effect in a criminal prosecution, the claimant must show that the "similarly situated individuals of a different race" were not prosecuted for similar crimes or that they received more favorable sentences. United States v. Smith, 231 F.3d 800, 808 (11th Cir. 2000).

Petitioner has made no such showing. As is discussed below, Petitioner has not established that the prosecutors violated Batson v. Kentucky, 476 U.S. 79 (1986), in making their peremptory strikes, and Petitioner's assertion that race was a factor in the inappropriate gifts given to the judge and the bailiff is pure speculation. More importantly, Petitioner has made no showing of a discriminatory effect in the imposition of the death penalty and he has not attempted to demonstrate that he has been treated differently from similarly situated individuals of a different race. Accordingly, this Court finds that Petitioner has failed to establish that the Georgia Supreme Court's conclusion that this claim has no merit "was contrary to, or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). In summary, Petitioner is not entitled to relief with respect to his Ground 2.

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2. Ground 5

In his subgrounds under Ground 5 that have survived this Court's rulings on procedurally barred claims, Petitioner asserts that his appellate counsel provided ineffective assistance of counsel at Petitioner's motion for a new trial and on appeal in violation of Strickland v. Washington, 466 U.S. 668 (1984), because appellate counsel: 5(a) failed to assert and protect certain of Petitioner's claims, 5(b) failed to file a petition for rehearing in the United States Supreme Court, 5(e) failed to file a timely motion to recuse the trial judge and failed to adequately develop the record regarding the trial judge's crying during the penalty phase of the trial, 5(f) failed to raise and litigate the issues of judicial, juror and bailiff misconduct during the trial, and 5(g) failed "to raise adequately the extraordinary racial implications of the pornographic items given to the judge and bailiff." Petitioner raised these claims in his state habeas corpus petition, and the state court failed to address the claims. This Court notes that Petitioner's trial counsel also served as appellate counsel.

The two-prong, performance/prejudice standard of ineffective assistance of counsel articulated in Strickland is applicable to claims of ineffective assistance of appellate counsel. See Smith v. Robbins, 528 U.S. 259, 285, 120 S. Ct. 746, 765, 145 L. Ed. 2d 756 (2000). Additionally, the Supreme Court has noted that appellate counsel need not advance every possible argument on behalf of his client, even those

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that are non-frivolous, and should instead concentrate his advocacy on "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987 (1983).

Petitioner's claim in Ground 5a that appellate counsel failed to assert and protect certain claims is conclusory in that Petitioner has not identified which claims appellate counsel failed to assert, other than those set forth in his other claims of ineffective assistance of appellate counsel.

Petitioner's claim in Ground 5b that appellate counsel failed to file a petition for rehearing in the United States Supreme Court does not state a claim for relief. Review of a criminal conviction by the Supreme Court is discretionary, see Ross v. Moffitt, 417 U.S. 600, 616-17 (1974), and criminal defendants have no federal constitutional right to counsel to pursue discretionary review. Id.; see Wainwright v. Torna, 455 U.S. 586, 587 (1982). Because Petitioner had no constitutional right to counsel, he was not deprived of effective assistance of counsel when his attorney filed the original petition for certiorari much less in counsel's failure to file a motion for rehearing. Wainwright, 455 U.S. at 587-88.

With respect to his claim in Ground 5e that appellate counsel failed to file a timely motion to recuse the trial judge, the Georgia Supreme Court held that "there

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was no basis for concluding that judicial bias existed" and that the trial judge did not err in failing to recuse herself from presiding over Petitioner's motion for a new trial proceedings. Wellons, 463 S.E.2d at 880. Petitioner has not presented any further evidence or argument that would tend to demonstrate that the state court's conclusion was erroneous. Accordingly, Petitioner has failed to demonstrate prejudice arising from the fact of appellate counsel's purported failure to timely file a motion for the trial judge to recuse herself.

As to his second claim in Ground 5e that appellate counsel failed to adequately develop the record regarding the trial judge's crying during the penalty phase of the trial, as is noted above, Petitioner has not demonstrated that the trial judge's alleged emotional display effected the outcome of Petitioner's trial. This Court concludes, therefore, that Petitioner has again failed to demonstrate prejudice.

In his Ground 5(f) Petitioner claims that appellate counsel failed to raise and litigate the issues of judicial, juror and bailiff misconduct during the trial. As this court discussed at length above, Petitioner has failed to establish that he is entitled to relief with respect to his various claims of misconduct. He thus cannot establish that his appellate counsel's failure to assert these claims on appeal prejudiced him.

Finally, regarding Petitioner's Ground 5(g), wherein Petitioner asserts that appellate counsel failed "to raise adequately the extraordinary racial implications of

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the pornographic items given to the judge and bailiff," this Court again notes that, because he is not entitled to relief on the underlying claim, he cannot demonstrate prejudice from his appellate counsel's purported failure to adequately raise the claim.

In summary, this Court concludes that Petitioner has failed to demonstrate that his appellate counsel was ineffective.

3. Grounds 6 and 7

In his Ground 6, Petitioner asserts that certain of the trial court's jury instructions at the guilt phase of the trial were improper. In his Ground 7, Petitioner challenges the jury instructions given during the penalty phase of the trial. The Georgia Supreme Court reviewed Petitioner's challenges to the jury instructions and concluded that the instructions did not violate state law. Wellons, 463 S.E.2d at 880-81. Establishing that the instructions violated the Constitution is a much higher burden.

> [A federal court's] limited role on habeas review, when faced with a challenge to a state law jury charge, is to determine whether any error or omission in the jury charge was so prejudicial as to amount to a violation of due process. See Carrizales v. Wainwright, 699 F.2d 1053, 1055 (11th Cir. 1983). In making that determination, we do not judge portions of the jury charge, or even the entire charge, standing alone. A defendant's right to due process is not violated unless an erroneous instruction, when viewed in light of the entire trial, was so misleading as to make the trial unfair. See Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 482, 116

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L.Ed.2d 385 (1991); Jacobs v. Singletary, 952 F.2d 1282, 1290 (11th Cir. 1992).

Agan v. Vaughn, 119 F.3d 1538, 1545 (11th Cir. 1997).

Having reviewed the challenged instructions in light of Petitioner's claims, this Court concludes that none of the instructions – either individually or when considered collectively – was so misleading that it rendered the trial unfair. With respect to the jury instructions from the guilt phase of the trial, Petitioner cannot establish a due process violation because, as is noted above, the evidence of Petitioner's guilt is so overwhelming that a faulty jury instruction could not have materially contributed to the jury's verdict.

As to the penalty phase instructions challenged in Ground 7, Petitioner's arguments regarding the instructions are almost all based on state law. As was noted above, the Georgia Supreme Court, found that the instructions complied with state law, and, in any event, establishing a state law violation would not entitle Petitioner to relief under § 2254.

Petitioner's only argument in Ground 7 that is based on constitutional law concerns his challenge to the trial court's instruction on mitigating evidence. Petitioner's entire discussion on the matter is as follows:

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The jury was improperly instructed regarding the definition of mitigating evidence. The court's entire charge on mitigating evidence was as follows:

> Mitigating or extenuating circumstances are those which you, the jury, find do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree for moral culpability or blame.

(T. 3343). Georgia does not have statutory mitigators and thus no charge was given defining statutory mitigators. This left the jury with the impression that no mitigators existed, particularly in light of the fact that the court did enumerate, in detail, the statutory aggravators to be considered. (T. 3343-47).

The Supreme Court held in Lockett v. Ohio, 438 U.S. 586 (1978), that the defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. Lockett v. Ohio, 438 U.S. 586 (1978). The instruction given in [Petitioner]'s trial unconstitutionally limited the mitigating factors the jury could consider.

[Doc. 29 at 61-62].

At issue in Lockett was Ohio's death penalty statute which limited the type of mitigation evidence that the judge could consider in imposing the death penalty. The central holding in Lockett was that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 604-605. This Court fails to see how the instruction quoted above precluded the jury from considering the mitigation evidence presented by Petitioner in the

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penalty phase. The trial judge permitted Petitioner to present numerous mitigation witnesses who testified regarding many aspects of Petitioner's background, character, and psychological history. Nothing in the instruction challenged by Petitioner indicates that the jury was precluded from considering this evidence.

Accordingly, Petitioner is not entitled to relief on his claims raised in his Grounds 6 and 7.

4. Ground 8

In his Ground 8, Petitioner challenges numerous rulings by the trial judge. Several of these claims have been ruled procedurally barred. Of the remaining claims, Petitioner raised them in his appeal, and the Georgia Supreme Court denied relief.

Specifically, with respect to Petitioner's claims that (1) the trial court should have recused the district attorney, and (2) several jurors who should have been excused but were not and other jurors who were excused should not have been, the Georgia Supreme Court made factual determinations that the trial court had acted properly in excusing and/or refusing to excuse the jurors in question. Wellons, 463 S.E.2d at 877-78. Petitioner has failed to present any argument that might tend to overcome the presumption of correctness that the state court's findings enjoy, and he thus provides this Court with no basis to find that the trial court acted improperly.

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With respect to Petitioner's assertion that the trial court improperly restricted defense counsel's voir dire, Petitioner enumerates eleven types of questions that the trial judge would not permit counsel to ask prospective jurors, claiming that the limitations imposed by the trial judge deprived him of a fair trial before an impartial jury. [Doc. 29 at 68-69]. The Georgia Supreme Court held that "[t]he trial court did not improperly restrict defense counsel's voir dire of prospective jurors. Presented with [Petitioner]'s pretrial motion requesting the latitude to pose questions regarding a variety of issues, the trial court merely applied settled principles of law." Wellons, 463 S.E.2d at 880.

Petitioner makes no argument and cites to no federal case law in support of the proposition that he was constitutionally entitled to ask the types of questions that he listed. Petitioner has thus failed to establish that this claim entitles him to relief.

Petitioner argues that the trial court improperly overruled seven of the defense counsel's objections during the trial. However, Petitioner makes no argument and cites to no federal case law in support of his claim that the trial court ruled improperly. Petitioner has thus failed to establish that this claim entitles him to relief.

Petitioner has likewise failed to establish that he is entitled to relief on his claim that the trial court failed to permit Petitioner to introduce certain mitigating evidence during the penalty phase of the trial that Petitioner had offered to plead guilty in

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exchange for a life sentence and evidence regarding other Cobb County cases where the district attorney had agreed to a life sentence. The Georgia Supreme Court held that the evidence was properly excluded under state law and cited to Mobley v. State, 455 S.E.2d 61 (Ga. 1995). Wellons, 463 S.E.2d at 880. In Mobley, a death penalty defendant offered evidence that he had tried to plead guilty in exchange for a life sentence and the district attorney rejected the offer. In rebuttal the former district attorney – who was by then a superior court judge serving with the judge presiding over Mobley's death penalty trial – testified in rebuttal that he rejected the offer because of the circumstances of the crime, Mobley's boastful attitude about the crime, Mobley's conduct while incarcerated, and the fact that Mobley was consumed with "pure unadulterated meanness." Mobley, 455 S.E.2d at 71. The judge then "summed up his decision to seek the death penalty with the statement: 'I've handled many cases with heinous facts of a killing, but I have never, never seen a defendant like Mr. Mobley.'" Id. at 72. Mobley challenged the testimony of the judge in his appeal, and the Georgia Supreme Court affirmed, but it held that evidence of a prior offer to plead guilty in exchange for a life sentence would no longer be permitted. According to the court, allowing such evidence "virtually mandates that counsel for both the defense and the prosecution testify at trial. As a result, counsel are forced into ethical conflicts, their credibility is improperly placed in issue, and advocacy roles are

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impaired." Id. at 70. Moreover, according to the court, "the potential is great that evidence offered by defense counsel or the prosecution will inject the sentencing hearing with inflammatory matters that could lead to the arbitrary imposition of a death sentence." Id.

This Court recognizes that death penalty defendants should be granted wide latitude in presenting mitigating evidence during the penalty phase of a trial. However, this Court finds the reasoning of the Georgia Supreme Court in Mobley to be quite compelling. Allowing evidence that a death penalty defendant had offered to plead guilty would necessarily open the door to the prosecution presenting possibly highly prejudicial and subjective evidence of just how horrible an individual they think the defendant is. Petitioner has not presented any argument that the Constitution mandates that this specific evidence should be permitted. Accordingly, this Court must deny relief on the claim.

5. Ground 9

Petitioner claims in Ground 9 that the state discriminated on the basis of race in the exercise of its peremptory strikes. Petitioner raised this claim in his appeal and the Georgia Supreme Court held:

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> The state exercised its peremptory strikes to remove from the jury three of the four African Americans on the panel, citing as a reason for each of the strikes that the potential juror was weak on the death penalty. [Petitioner] contends that the state's reasons are pretextual and that the state engaged in purposeful discrimination against African American jurors. See Batson v. Kentucky, 476 U.S. 79, 97-98, 106 S. Ct. 1712, 1723-24, 90 L. Ed. 2d 69 (1986). He argues that the state's discriminatory intent is evident upon a review of the entire voir dire of each of the stricken jurors-none of whom expressed more than slight reservations about the death penalty-in conjunction with the voir dire of white jurors who were not stricken and who were at least as reticent to impose the death penalty.
>
> The trial court's determination that [Petitioner] failed to establish purposeful discrimination was not clearly erroneous. See Lingo v. State, 263 Ga. 664, 666, 437 S.E.2d 463 (1993). The prosecutor presented "concrete, tangible, race-neutral and neutrally-applied" reasons for the strikes sufficient to overcome [Petitioner]'s prima facie case of discrimination. See id. Two of the three stricken black jurors expressed some reservations about the death penalty, and the prosecution contemporaneously noted on the record the apparent reticence of the third, who hesitated in her answers on the subject. Each of the white jurors who expressed slight reservations about the death penalty and who were not stricken also expressed moderate to strong reservations about a mental health defense. Therefore, on balance, those jurors were more favorable for the state than for the defense.

Wellons, 463 S.E.2d at 877.

Petitioner has made no showing that the state court's conclusion on his Batson claim "was contrary to, or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Accordingly, Petitioner is not

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entitled to relief pursuant to 28 U.S.C. § 2254(d) with respect to his claim of a Batson violation.

6. Ground 10

In his Ground 10 Petitioner complains that the admission into evidence of a crime scene video was inflammatory and prejudicial and rendered Petitioner's trial fundamentally unfair. In response to this claim, the Georgia Supreme Court held:

> The trial court did not err in permitting the jury to view a videotape of the crime scene. See Foster v. State, 258 Ga. 736, 740, 374 S.E.2d 188 (1988). The videotape was relevant to show the location of the body in relation to various evidence and to the scene of the murder, the extent to which [Petitioner] had concealed the body from view, and the relationship of various items of evidence inside the apartment. Therefore, it was clearly probative of central issues, including intent, [Petitioner]'s mental state, kidnapping and the reliability of Cole's identification of [Petitioner].

Wellons, 463 S.E.2d at 881-82.

It is not the province of a federal habeas corpus court to reexamine state law rulings on evidentiary issues. See 28 U.S.C. § 2254(a); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). This Court reviews state court evidentiary rulings in a habeas corpus proceeding to determine only "'whether the error, if any, was of such magnitude as to deny petitioner his right to a fair trial.'" Futch v. Dugger, 874 F.2d 1483, 1487 (11th Cir. 1989) (quoting Osborne v. Wainwright, 720 F.2d 1237, 1238

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(11th Cir. 1983)). Erroneously admitted evidence deprives a defendant of fundamental fairness only if it was a "'crucial, critical, highly significant factor' in [Petitioner's] conviction." Williams v. Kemp, 846 F.2d 1276, 1281 (11th Cir. 1988) (quoting Jameson v. Wainwright, 719 F.2d 1125, 1126-27 (11th Cir. 1983)). The evidence must be inflammatory or gruesome and so critical that its introduction denied petitioner a fundamentally fair trial. Futch v. Dugger, 874 F.2d at 1487; see also Dickson v. Wainwright, 683 F.2d 348, 350 (11th Cir. 1982) ("An evidentiary error does not justify habeas relief unless the violation results in a denial of fundamental fairness.").

Because, as this Court has repeatedly stated, the evidence of Petitioner's guilt was overwhelming, this Court cannot find that the crime scene evidence was a crucial, critical, highly significant factor in Petitioner's conviction, and Petitioner is not entitled to relief for his claim in Ground 10.

7. Grounds 12, 13 and 24

In his Ground 12, Petitioner complains of various instances of alleged prosecutorial misconduct arising from various comments that the prosecutors made during both phases of the trial. In his Ground 13, Petitioner argues that improper

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victim worth evidence was introduced by the prosecution. In his Ground 24, Petitioner argues that bad act evidence was introduced by the prosecution.

A prosecutor's statements must be evaluated in light of the entire trial record. United States v. Young, 470 U.S. 1, 11-12 (1985). "The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (1974)). In order for prosecutorial comments to entitle a petitioner to habeas corpus relief, those comments must have been improper and they must have impacted the jury's ability to fairly judge the evidence at trial, rendering the trial fundamentally unfair. Young, 470 U.S. at 12; see United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991); Brooks v. Kemp, 762 F.2d 1383, 1400 (11th Cir. 1985), vacated on other grounds and reinstated, 809 F.2d 700 (11th Cir. 1987). If there is no reasonable probability that the outcome of the trial would have been different absent the improper remarks, the trial cannot be said to have been fundamentally unfair. See Brooks, 762 F.2d at 1402; Tucker v. Kemp, 802 F.2d 1293, 1296 (11th Cir. 1986) (en banc), cert. denied, 480 U.S. 911, 107 S. Ct. 1359, 94 L. Ed. 2d 529 (1987). As part of this inquiry, the court must consider the evidence of guilt, as "[a] court need not determine whether specific arguments are proper or improper if, taken as a whole, they would not require relief."

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Cargill v. Turpin, 120 F.3d 1366, 1379 (11th Cir. 1997) (internal quotation and citation omitted). Where the evidence against the accused is very strong, in order to merit relief, prosecutorial misconduct would have to be highly egregious and pervasive so as to effectively undermine confidence in the outcome of the proceeding.

Petitioner raised his claims of prosecutorial misconduct in his appeal, and the Georgia Supreme Court held:

> The prosecutor did not improperly interject victim impact evidence in either phase of trial. The age of the victim was relevant and thus an appropriate subject for comment by the prosecutor. See Smith v. State, 255 Ga. 685, 686, 341 S.E.2d 451 (1986). In particular, in the sentencing phase, her young age could be considered in the jury's determination whether [Petitioner] acted with a depraved mind. See Hance v. State, 245 Ga. 856, 862, 268 S.E.2d 339 (1980). The prosecutor's characterization of the victim as a little girl was neither improper nor inaccurate. The fact that the victim was a sophomore in high school was relevant background information, because the murder occurred during the first week of the school year, the victim was abducted on her way to the school bus stop, and her school supplies were strewn at the scene of the murder and admitted into evidence. One could reasonably infer from the evidence that the murder was unprovoked, so the prosecutor's comment that the victim did nothing to deserve her death was not inappropriate. See Fugate v. State, 263 Ga. 260, 265, 431 S.E.2d 104 (1993); Kinsman v. State, 259 Ga. 89, 92, 376 S.E.2d 845 (1989). Argument that [Petitioner] deprived the victim of life experiences and opportunities which he had enjoyed, such as dating, college, marriage and parenting, was not impermissible. See Ledford v. State, 264 Ga. 60, 67-68, 439 S.E.2d 917 (1994). The prosecutor's comment that perhaps the victim, like [Petitioner], could have complained about her formative years was merely an example to rebut [Petitioner]'s claim that his troubled childhood was a mitigating factor. Pleas for retribution, such as the request that the jury return "one for India," are not improper. See

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Walker v. State, 254 Ga. 149, 159, 327 S.E.2d 475 (1985); Johnson v. State, 187 Ga. App. 803, 804, 371 S.E.2d 419 (1988).

[Petitioner] contends that the prosecutor improperly commented on [Petitioner]'s failure to testify. In closing argument in the guilt-innocence phase of trial, the prosecutor said that "only two people know what went on in that apartment," and "there's only two people who can tell us how long that horror lasted."

We find no error. Reversal for prosecutorial misconduct requires a finding that the prosecutor's manifest intent was to comment on [Petitioner]'s failure to testify or that the jury would naturally and necessarily understand the remarks as a comment on [Petitioner]'s silence. See Lobdell v. State, 256 Ga. 769, 774-775, 353 S.E.2d 799 (1987). In context, the prosecutor's comments were but a small part of a summary of the evidence best understood as conceding the ambiguities therein and were unlikely to be interpreted as comments on [Petitioner]'s failure to testify. Furthermore, the trial court appropriately charged the jury that no adverse inferences were to be drawn from [Petitioner]'s silence.

[Petitioner] enumerates as error various other comments made by the prosecutor in closing argument. We find no impropriety in any of the remarks. In particular, the prosecutor's comment that Saunders was a meticulous housekeeper who valued family things was relevant to [Petitioner]'s motive in ransacking her apartment and destroying items she treasured, and it was also relevant to an understanding of the evidence collected at the scene. The prosecutor's argument that [Petitioner]'s presentation of evidence about his religious beliefs was offensive and should not be considered as mitigating was a proper comment on the genuineness of a "jail-house" religious conversion, because the argument "addresses itself to the sincerity of the defendant's rehabilitation, which is a legitimate consideration on the issue of sentence." Todd v. State, 261 Ga. 766, 768 n. 2, 410 S.E.2d 725 (1991).

[Petitioner] contends that the prosecutor elicited improper testimony regarding [Petitioner]'s prior difficulties with the victim without first

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giving notice pursuant to Uniform Superior Court Rule 31.3. Saunders testified that sometime in the weeks prior to the murder, when the victim was watching television in Saunders' apartment, Saunders saw [Petitioner] stare at the victim with a look in his eyes and a gesture that made Saunders uncomfortable. Saunders further testified that, as a result of what she observed, she later told [Petitioner] never to let the victim in the apartment when Saunders was not home.

Compliance with U.S.C.R. 31.3 before admitting evidence of prior acts between the victim and the accused is mandatory. Barrett v. State, 263 Ga. 533, 535, 436 S.E.2d 480 (1993). We do not think that the described conduct rises to the level of a prior difficulty.

[Petitioner] contends that the prosecutor improperly introduced evidence of uncharged conduct and other bad acts allegedly committed by [Petitioner]. We disagree. In each instance, the state properly impeached [Petitioner]'s character witnesses. One of the witnesses had been a member of the campus security police force when [Petitioner] was in college. After he testified regarding [Petitioner]'s good character, the state properly questioned whether he had knowledge of two incidents on campus involving [Petitioner]. The witness denied personal knowledge of one incident but stated that the second incident was resolved in [Petitioner]'s favor and that the witness personally reprimanded the officer involved. Immediately following the question regarding the first incident, the trial court instructed the jury that the testimony did not establish that the incident occurred and that the question was allowed for the limited purpose of testing the witness' knowledge of [Petitioner]'s character and activities. The other witness was a deputy sheriff who testified on direct regarding [Petitioner]'s good behavior in jail. Defense counsel elicited testimony from the witness that he had no first-hand knowledge of [Petitioner]'s disciplinary problems and only knew of them from records. On cross-examination, the state properly obtained an admission from the witness that he was aware of a stack of disciplinary reports involving [Petitioner] which had preceded the witness' employment at the jail and that he was aware that [Petitioner] had constantly been in trouble.

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> When a defendant places his character in issue, the state may cross-examine character witnesses to test the extent and foundation of the witnesses' knowledge of the defendant's character. Jones v. State, 257 Ga. 753, 756, 363 S.E.2d 529 (1988). The pretrial notice requirements of O.C.G.A. § 17-10-2 did not apply. See Christenson v. State, 261 Ga. 80, 90-91, 402 S.E.2d 41 (1991). The state was required only to demonstrate, following [Petitioner]'s objections, that its questions were asked in good faith and based on reliable information that could be supported by admissible evidence. See id. The state made the requisite demonstration, so its inquiries were proper. See Medlock v. State, 264 Ga. 697, 698-699, 449 S.E.2d 596 (1994).
>
> Having found no prosecutorial misconduct, we reject [Petitioner]'s contention that the cumulative effect of prosecutorial misconduct requires reversal.

Wellons, 463 S.E.2d at 878-880.

Although the state court did not address the prosecutorial misconduct claims in the context of federal constitutional law, this court must nonetheless defer to the state court decision unless Petitioner has demonstrated that the reasoning or the result of the state-court decision contradicts Supreme Court precedent or was unreasonable in light of the facts. Early v. Packer, 537 U.S. 3, 8 (2002). Petitioner has made no such demonstration.

Moreover, none of the prosecutor's comments or the evidence introduced by the prosecutor raised by Petitioner is particularly shocking or unusual. Certainly, none of those comments, either individually or when considered cumulatively, has shaken this Court's confidence in the outcome of either phase of Petitioner's trial.

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Accordingly, Petitioner's claims in Grounds 12, 13, and 24 do not entitle him to relief.

8. Ground 26

In Ground 26, Petitioner complains that the trial court improperly allowed the state to admit evidence of a suggestive witness identification of Petitioner. Petitioner raised this claim in his appeal, and the Georgia Supreme Court held:

> [Petitioner] contends that Cole's eyewitness identification of him, described above, was the unreliable product of unduly suggestive procedures, creating a substantial risk of misidentification at trial, and that therefore it should not have been admitted. [Petitioner] further contends that the district attorney was involved in the suggestive procedure and therefore had a conflict of interest as prosecutor and witness. He argues that, because the defense was unable to call the district attorney to testify, a new trial is mandated.
>
> We find no error. First, the district attorney stated in his place at a hearing that he was not involved in the identification procedure, and the testimony of Cole supports that recollection. Second, the identification procedure was sufficiently reliable. Cole had an opportunity to view [Petitioner] at close range in broad daylight at the time he saw [Petitioner] carrying the sheet; Cole was a retired military police officer with 25 years of experience who paid close attention when he returned to the scene in his car specifically to get a second view of the person he had seen carrying the victim's body; he had given an accurate description of [Petitioner], including his skin tone, approximate height and build, and had seen [Petitioner] again near the apartment complex before the identification at issue; only a short time had passed between Cole's earlier sightings of [Petitioner] and the identification; and Cole stated at the scene and at trial that he was 75 to 80 percent certain

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> [Petitioner] was the same man he had seen with the sheet. Manson v. Brathwaite, 432 U.S. 98, 113-116, 97 S. Ct. 2243, 2252-2254, 53 L. Ed. 2d 140 (1977). Furthermore, there is no evidence that Cole was coerced to make the identification. See Manson, 432 U.S. at 116, 97 S. Ct. at 2254. Significantly, Cole had already excluded two other individuals as possible suspects. Under all of these circumstances, we cannot find "a very substantial likelihood of irreparable misidentification." See id., citing Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247 (1968). It was therefore for the jury to decide the weight to be accorded to the testimony. See Manson, 432 U.S. at 116, 97 S. Ct. at 2254.

Wellons, 463 S.E.2d at 877-78.

This Court has reviewed the record in light of Supreme Court precedent and concludes that the state court's conclusions were correct. Accordingly, Petitioner is not entitled to relief on his Ground 26.

9. Unsupported Grounds

Having reviewed the record, this Court concludes that Petitioner has failed to provide sufficient support to establish his claims in Ground 15 that procedural and substantive errors, when considered cumulatively deprived Petitioner of a fair trial; in Ground 23 that the presence of the media in the courtroom violated Petitioner's constitutional rights; in Ground 33 that the trial court failed to suppress illegally seized evidence; in Ground 34 that Petitioner's death sentence is a nullity because the trial court sentenced Petitioner to death by electrocution and the Georgia Supreme

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Court has now declared that execution by means of electrocution violates the Eighth Amendment;[11] and in Ground 39 that, because the trial court sentenced Petitioner to death by electrocution, executing Petitioner by lethal injection would constitute an ex post facto violation.

Petitioner is therefore denied relief as to those claims.

10 Non-Case-Specific Grounds for Relief

Petitioner as also raised various grounds that are not specific to his case, none of which entitle him to relief.

Petitioner claims regarding the Georgia's Unified Appeal Procedure ("UAP") and the judge's report required thereby (Grounds 16 & 25). see O.C.G.A. §§ 17-10-35, 17-10-36; Smith v. Zant, 887 F.2d 1407, 1415 n.19 (11th Cir. 1989), do not entitle him to relief. Petitioner contends that the UAP is unconstitutional because it upsets the balance of power between the state and the accused in an adversary system; violates a criminal defendant's right to silence; violates equal protection because it applies only in capital cases; and violates the right to counsel by (1) asking counsel, in the presence of prosecutors, to identify which issues will or will not be raised,

[11] In Dawson v. State, 554 S.E.2d 137, 144 (Ga. 2001), the Georgia Supreme Court held that electrocution as a method of execution violates the Georgia Constitution and that all future executions would be carried out via lethal injection.

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allegedly forcing counsel to disclose trial strategy, (2) asking defendant during the course of trial whether he is satisfied with counsel without providing independent counsel to assist in making this judgment, and (3) directly involving the court in the attorney-client relationship. Further, Petitioner claims that the judge's report required by the UAP violates due process because the death penalty defendant is not permitted to challenge the contents of the report.

Petitioner raised these claims in his appeal, and the Georgia Supreme Court held that the UAP is not unconstitutional. Wellons 463 S.E.2d at 882 (citing to Ledford v. State, 439 S.E.2d 917 (Ga. 1994) (regarding UAP) and McMichen v. State, 265 Ga. 598 (Ga. 1995) (regarding judge's report)). The UAP first came under scrutiny by the Georgia Supreme Court in Sliger v. State, 282 S.E.2d 291 (Ga. 1981). In that case the court exhaustively reviewed the UAP and held that it did not violate the Constitution. Every subsequent case that has reviewed the matter has concurred with Sliger. See, e.g., Potts v. State, 376 S.E.2d 851, 859 (Ga. 1989); Moon v. State, 375 S.E.2d 442, 453 (Ga. 1988). Petitioner has presented no authority to the contrary, and he has failed to demonstrate why the state court's conclusion is not entitled to deference pursuant to 28 U.S.C. § 2254(d). Having reviewed Sliger and the UAP, the Court finds no merit to Petitioner's claims.

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Petitioner has failed to demonstrate why the Georgia Supreme Court's conclusions – that the grand and traverse jury selection process in Cobb County and in Georgia is not unconstitutional in its design and in practice (Ground 18)– were an unreasonable application of constitutional law. Wellons 463 S.E.2d at 882. These claims must therefore be denied.

As to his claim (Ground 17) that the death penalty, as imposed in Georgia, is unconstitutional because of the vagueness of Georgia's death penalty statute and the arbitrariness in the manner in which the death penalty is sought by prosecutors, this Court finds that the claim is conclusory and does not entitle Petitioner to relief. Under his Ground 17, Petitioner makes assertions that:

> The district attorney in Petitioner's case has historically sought the death penalty in a racially discriminatory manner against African-American defendants charged with killing caucasian victims. In the instant case, Petitioner was victimized by this history or racial discrimination in that the district attorney viewed the instant case as a way to "balance" his statistics by seeking the death penalty in a case with an African American victim. The death penalty, therefore, was sought as a result of the District Attorney's history of seeking the death penalty in a racially discriminatory fashion and not because of any legitimate reasons that would justify this case being prosecuted as a death penalty case.

[Doc. 29 at 114-15].

In response this Court notes that (1) Petitioner has provided no citation or factual support for the claims whatsoever, (2) the assertion that the district attorney

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sought the death penalty in Petitioner's case because of Petitioner's race does not demonstrate that the death penalty as imposed in Georgia is either vague or arbitrary, and (3) Petitioner's claims that the death penalty was sought in his case because of his race is disposed of in this Court's discussion of Petitioner's Ground 2.

Finally, we turn to Petitioner's claim that lethal injection as practiced in Georgia constitutes cruel and unusual punishment in violation of the Eighth Amendment. As is mentioned above, Petitioner seeks a hearing on this claim. However, another death row inmate, Michael Wayne Nance, challenged Georgia's lethal injection procedures in state court, and the Gwinnett County Superior Court held a three-day hearing to receive evidence, at which the issues raised by Petitioner were fully developed. [12]

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[12] At the hearing:

> The evidence adduced included testimony from individuals that participated in lethal injections in Georgia, including the president of the Medical College of Georgia, an anesthesiologist that reviewed the records and protocols of Georgia's first six lethal injections, and a pathologist who performed autopsies on the first six subjects; Georgia Department of Corrections ("DOC") lethal injection protocols, information about the equipment used, and DOC records from the first six lethal injections; evidence that Pentothal, the first drug injected into the prisoner, rapidly induces unconsciousness, but sensitivity to Pentothal varies among individuals and thus the required one gram may not be enough to induce complete unconsciousness in some; evidence that in previous lethal injections, the execution staff allegedly deviated from and/or was not familiar with the protocol; a claim that Pavulon, which paralyzes the muscles, is not necessary to bring about death, rather is used only to prevent "unpleasant" twitching before death; evidence of

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Petitioner cites liberally to that hearing in his final amended petition, and he does not state what additional evidence or testimony he would present at a hearing before this Court. Accordingly, this Court accepts the testimony from the Nance hearing as what the evidence would be in a hearing before this Court, and concludes that a further hearing regarding Georgia's lethal injection protocol is not necessary.

Petitioner has provided a lengthy discussion on his claim that lethal injection in Georgia violates the Eighth Amendment, asserting, inter alia, that the three drugs injected into the prisoners in order to kill them and the amounts of those drugs could cause the inmate to suffer unnecessary pain during the execution process, that the Georgia lethal injection protocols are insufficient because they do not require the

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> complications in previous executions and speculation that potential problems could arise during the procedure; evidence that the State is not keeping accurate records of the executions and how much medicine staff is administering and thus it is impossible to know whether there is a risk of inflicting unnecessary and severe pain and suffering; Georgia DOC Lethal Injection Procedure and records of another five completed lethal injections; a study by Dr. Leonidas G. Koniaris that 43% of prisoners in Georgia, South Carolina, North Carolina, and Arizona had [Pentothal] concentration levels consistent with consciousness, meaning that prisoners may experience asphyxiation, severe burning sensations, massive muscle cramping, and cardiac arrest; and finally, autopsy and toxicology reports of the last four prisoners executed, which allegedly show that [Pentothal] concentration in the blood was significantly below what is required to properly anesthetize a person.

Crowe v. Head, 426 F. Supp. 2d 1310, 1353 (N.D. Ga. 2005).

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necessary level of experience and medical training required handle possible problems that may arise during an execution, and that official witnesses are permitted to view only a brief portion of the execution.

Under the Eighth Amendment, a method of execution must not inflict "unnecessary pain, undue physical violence, or bodily mutilation and distortion," In Re Kemmler, 136 U.S. 436, 447 (1890), and it must comport with evolving standards of decency, Gregg v. Georgia, 428 U.S. 153, 171 (1976).

As Respondent points out, no court has concluded that lethal injection violates the Eighth Amendment. [Doc 30-2 at 8-9 (citing numerous cases upholding lethal injection)].[13] In the Nance hearings mentioned above, the state provided evidence of its own to demonstrate that the inmates either did not suffer pain or that the pain was either de minimis or so short-lived as to be de minimus.[14] After this exhaustive

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[13] This Court acknowledges that the question of the efficacy of the three-drug cocktail and whether it causes excessive pain is under judicial investigation by state courts outside of Georgia.

[14] [T]he State rebutted the defendant's evidence that sodium pentothal levels of executed prisoners were consistent with consciousness at the time of lethal injection. Dr. Kris Sperry, chief medical examiner for the State of Georgia, testified that "these inmates were essentially dead . . . well prior to the termination of . . . the injection of the sodium Pentothal." . . . He further testified that by the time they died, "[t]hey [were] completely unconscious and insensate to pain." Id. Dr. Sperry's testimony also casts doubt on Dr. Koniaris's report, which, by Dr. Koniaris's own admission, lacks reliability: "Extrapolation of

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evidentiary exploration, the trial court concluded that Georgia's lethal injection protocols did not violate the Eighth Amendment and the Georgia Supreme Court summarily affirmed. Nance v. State, 623 S.E.2d 470, 474 (Ga. 2005) (citing Riley v. State, 604 S.E.2d 488 (Ga. 2004) and Dawson v. State, 554 S.E.2d 137 (2001)).

Having reviewed the claim, this Court finds that Plaintiff has not established that lethal injection as practiced in Georgia violates the Eighth Amendment. Of particular persuasiveness is the discussion in Reid v. Johnson, 333 F. Supp. 2d 543, 546-54 (E.D. Va. 2004), regarding Virginia's lethal injection protocol, on which the Georgia protocol is apparently based. [Doc. 29 at 206-07]. Petitioner's final ground for relief is denied.

Conclusion

For the foregoing reasons, this Court holds that Petitioner has failed to establish that he is entitled to 28 U.S.C. § 2254 relief. Accordingly,

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> antemortem depth of anaesthesia from post-mortem blood thiopental concentrations is admittedly problematic." Dr. Leonidas G. Koniaris, et al., 365 *The Lancet* 1412, 1413 (Apr. 16, 2005). Even assuming Petitioner could show that some prisoners may experience pain and suffering, the rapidity with which death ensues is persuasive.

Crowe, 426 F. Supp. 2d at 1353-54.

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IT IS ORDERED that the instant petition for a writ of habeas corpus is **DENIED** and the instant action is thus **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED this 20 day of February, 2007.

WILLIS B. HUNT, JR.
UNITED STATES DISTRICT JUDGE

AO 72A
(Rev 8/82)

OPPOSITION BRIEF

ORIGINAL

No. 09-5731

Supreme Court, U.S.
FILED
AUG 12 2009
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS WELLONS,

PETITIONER,

v.

HILTON HALL, WARDEN,
GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTIONS PRESENTED

CAPITAL CASE

A. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO REVIEW A DECISION BY THE ELEVENTH CIRCUIT THAT IS MOOT?

B. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO REVIEW A FACT-SPECIFIC APPLICATION PROPERLY UITILIZING THIS COURT'S WELL-ESTABLISHED PRECEDENT?

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SPECIFIC DENIAL OF "FACTS" ALLEGED BY PETITIONER

Although Petitioner had no criminal *convictions* at the time of trial, (Petitioner's petition, p. 2), Petitioner had previously been charged with kidnapping his ex-wife, Debra Wellons Moreland, and had prior arrests for armed robbery. Additionally, Petitioner had several disciplinary reports from the Cobb County Detention Center, incurred while awaiting trial, which included Petitioner's attempted sexual assault of another inmate. Further, Petitioner's sister, Patricia Wellons, claimed that Petitioner had previously killed a man over a girl in Miami in a pool hall. Additionally, Petitioner had been fired from his job at a local hospital for making sexual advances on a patient and masturbating in front of the patient.

BRIEF IN OPPOSITION
ON BEHALF OF RESPONDENT

I. STATEMENT OF FACTS

The Georgia Supreme Court found that the evidence presented at trial established the following:

> Throughout the summer of 1989, Wellons lived with his girlfriend, Gail Saunders, in her townhouse apartment in Cobb County. Early that summer, Saunders' 14-year-old son Tony also lived in the apartment. Tony and the victim, who lived in a neighboring apartment with her mother, were friends. The victim occasionally visited Tony inside Saunders' apartment, where the two youths would watch television or play Nintendo. Wellons encouraged Tony to date the victim, remarking several times that she was a good-looking girl. At some point during the summer, Tony moved to Chattanooga to live with his grandparents. The victim continued to spend time with Saunders occasionally. Saunders described herself as the victim's "play mommy" with whom the victim shared confidences.
>
> Wellons and Saunders had become acquainted at the hospital where both worked, Wellons as a counselor in the psychiatric ward. Wellons moved in with Saunders on the pretense that he owned a home but was unable to occupy it, because an ex-girlfriend had moved there with her two young daughters, and he could not in good conscience turn them out. Over the summer Wellons proposed marriage to Saunders. However, by then Saunders had become wary of Wellons, who was increasingly hostile and abusive. She verbally accepted his proposal out of fear, all the while seeking an escape from her predicament.
>
> On the evening of August 30, 1989, Saunders told Wellons that their relationship was over and that he must move out of the apartment. Wellons, who had recently been fired from his job, purchased a one-way ticket to Miami for a flight departing on the evening

of August 31. Fearing to be alone with Wellons the night before his departure, Saunders told Wellons that she was going to Chattanooga to spend the night with her parents and enroll Tony in school. Instead, Saunders went to the home of a female friend.

That evening, Wellons began making desperate attempts to reach Saunders by telephone. He called her mother in Chattanooga repeatedly, only to be told that Saunders had not arrived. Wellons then called Saunders' friends, but no one knew or revealed her whereabouts. He called his mother and told her he suspected that Saunders was with another man. Wellons became increasingly angry and began drinking. He ransacked Saunders apartment. He overturned potted plants and furniture, threw flour onto the floor, and poured bleach over all of Saunders' clothes, carefully sparing his and Tony's belonging in the process.

After the apartment was demolished, Wellons began attempts to cover up his deed. He broke a window, from the inside out, cutting his hand in the process and smearing blood around the apartment. He stacked electronic equipment by the door. He then called 911 at approximately 3:00 a.m. on August 31 to report a burglary. When a police officer arrived, Wellons told the officer that he had come home to find the apartment ransacked, although no items were missing. Wellons explained to the officer that he cut his hand while struggling to uncover a stash of money to determine if it had been taken. Sometime after the officer left, Wellons wrote a racial slur across the wall in Saunders' bedroom.

Several hours later, at approximately 8:00 a.m., the victim said goodbye to her mother and walked from her apartment, past Saunders' door, to the school bus stop. Shortly thereafter, Saunders' next door neighbor heard muffled screams from inside Saunders' apartment.

The apartment building was close to a wooded area, beyond which was a grocery store. At approximately 2:00 p.m., Wellons approached an acquaintance who was

employed at the grocery store and asked to borrow a car. The acquaintance refused. Wellons told the acquaintance that when he (Wellons) returned home the previous night, he encountered two white men who were burglarizing the apartment. Wellons said that he successfully fought off the intruders but explained that he had in the process sustained the injuries to his hand.

About half an hour later, Theodore Cole, a retired military police officer, was driving near the wooded area behind the apartment complex. He spotted in the distance a person carrying what appeared to be a body wrapped in a sheet. He distinctly saw feet dangling from the bottom of the sheet. Cole drove on but then returned for a second look. He drove around in the parking lot of the apartment complex and saw nothing. As he was driving away, however, he saw a man in this rear view mirror walk along the road and throw a sheet into the woods.

The police first discovered sheets, clothing and notebooks bearing Tony's name. Then, upon close inspection of a pile of tree branches near where he had seen the man carrying the sheet, Cole spotted the body of India Roberts. When the branches were removed, the officers discovered that the victim was completely unclothed, with cuts on one side of her face and ear and bruises on her neck.

During the search of the woods, Cole spotted a black man with a bundle under his arm near the apartment building and identified him as the man Cole had seen carrying the sheet. Cole and an officer chased the man, but as they approached the building, the man turned the corner and Cole and the officer heard a door shut. The officer learned from a passerby which apartment was occupied by a man fitting the description given by Cole. He knocked on Saunders' door and announced his presence, but there was no answer. He returned to join the other officers, who were investigating the scene in full force, with helicopters overhead.

Wellons, now trapped inside Saunders' apartment with residual evidence of his crime, gave up his attempt to dispose of the evidence in the woods. He first tried to clean the apartment and his clothes. He then abandoned that project, changed into swim wear, grabbed an old, yellowed newspaper and a cup of wine, partially barricaded and locked the door, and headed for the pool. On his way, Wellons caught sight of a police officer and stopped abruptly. The officer began questioning him. Initially evasive, Wellons did ultimately tell officers that the injuries to his hand, and new scratches to his face, were sustained during a scuffle with two men whom he had caught burglarizing Saunders' apartment.

While investigating the scene, officers had asked Cole whether either of two black males was the man Cole had seen carrying the sheet. Cole immediately ruled out each of the men. Then, while officers were questioning Wellons, one officer standing at a distance from the questioning asked Cole whether Wellons was the man he had seen. Cole said that although Wellons was wearing different clothing from the man he had seen carrying the sheet, and whom he had again seen near the complex, Cole was 75 to 80 percent certain that Wellons was the same man.

Later that day, officers searched Saunders' apartment. Inside, they found numerous items of evidence including the victim's notebook and earrings. In Tony's room, they discovered the victim's panties. They also found blood on Tony's mattress and box springs. The mattress had been flipped so that the bloody portion was facing downward, and the bed had been remade.

The autopsy revealed that the victim died from manual strangulation, which in itself would have taken several minutes. The autopsy also showed that Wellons had attempted to strangle the victim with a ligature, possibly a telephone cord, and that he had bruised her and cut her face and ear with a sharp object. The evidence suggested that Wellons had dragged or otherwise forcibly moved the victim from the kitchen

> up the stairs to Tony's bedroom. Finally, the autopsy revealed a vaginal tear and copious amounts of what appeared to be seminal fluid within the victim's vagina. She had defensive wounds to her hands, and her blouse was stained with her own blood.

Wellons, 266 Ga. 78-81.

II. RELEVANT PROCEDURAL HISTORY

A. TRIAL PROCEEDINGS

Petitioner, Marcus Wellons, was indicted in the Superior Court of Cobb County, Georgia on April 5, 1990, for the August 31, 1989 rape and murder of India Roberts. Petitioner was tried before a jury May 19 through June 8, 1993 and was convicted of murder and rape. On June 8, 1993, Petitioner was sentenced to death for murder and to life imprisonment for rape.

Following Petitioner's trial, trial counsel, as part of their investigation for the motion for new trial, interviewed the jurors from Petitioner's trial. Following those interviews, trial counsel filed a Motion to Recuse the trial judge asserting that the trial judge should have recused herself from the motion for new trial proceedings based on the claims of trial court misconduct in the trial judge's acceptance and failure to disclose her receipt of "gag gifts" from the jury and based on the trial judge speaking to the jurors in a restaurant. In this motion to recuse, Petitioner did not allege that the jury or the

judge harbored any racial bias against Petitioner. Further, Petitioner did not allege juror or bailiff misconduct.

In support of his Motion to Recuse, Petitioner submitted the affidavit of his trial attorney at the motion for new trial. In that affidavit, the trial attorney related hearsay statements from a juror that the attorney interviewed. Petitioner did not present, nor attempt to present, any other evidence to support the claim of judicial misconduct or as a basis for the recusal of the trial judge.

In denying Petitioner's motion to recuse, the trial court assumed all facts alleged in Petitioner's submitted hearsay affidavit were true, as required by Georgia's Uniform Superior Court Rules.[1] The trial court determined that the giving of the gag gifts "alone, without a showing that the Court's conduct influenced the jury to find Defendant guilty or sentence the Defendant to death, [was] insufficient" to warrant recusal of the trial judge.

B. DIRECT APPEAL TO THE GEORGIA SUPREME COURT

On direct appeal, Petitioner alleged improper communications between the trial court and the jurors and between the bailiffs and the jurors. Petitioner claimed that

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[1] Georgia's Uniform Superior Court Rule 25.3.

"near the conclusion or at the conclusion of the penalty phase of the trial, the jurors presented the judge and at least one of the bailiffs with 'gag' gifts." Petitioner asserted that the giving of these gifts was "highly improper, and calls into question the relationship between the court and the jurors." Petitioner claimed that it would be hard "to imagine that jurors would present such a gift to a judge without some personal relationship beyond that exhibited in the courtroom." There was no reference by Petitioner in his appellate brief to any racial bias being shown by the jury in the presentation of these gag gifts.

The Georgia Supreme Court affirmed Petitioner's convictions and sentences on November 20, 1995. Wellons v. State, 266 Ga. 77 (1995). As to Petitioner's claims regarding the trial judge, the Georgia Supreme Court denied relief holding, "[a]ssuming that the trial judge in fact encountered and spoke to the jurors in a restaurant and that she and a bailiff were the passive recipients of gag gifts, there was no basis for concluding that judicial bias existed." Wellons v. State, 266 Ga. 77, 88 (1995). A petition for writ of certiorari was denied by this Court on October 7, 1996. Wellons v. Turpin, 519 U.S. 830 (1996).

C. STATE HABEAS PROCEEDINGS

On May 27, 1997, Petitioner filed a state habeas corpus petition. On October 28, 1997, Petitioner filed an amended state habeas corpus petition, which replaced the original state petition for writ of habeas corpus in its entirety.

In the state habeas proceedings, Respondent asserted that the claims of juror and bailiff misconduct were procedurally defaulted. The state habeas court found these issues procedurally barred from its review, albeit based on the doctrine of *res judicata* instead of the state law of procedural default.

Following the denial of state habeas corpus relief, Petitioner applied for a certificate of probable cause to appeal from the Georgia Supreme Court. In his application to appeal, Petitioner asserted for the first time that the jurors' presentation of the milk chocolate penis and breasts to the trial judge and the bailiff, when the Petitioner was African-American, established racial bias on the part of the jury. The Georgia Supreme Court denied Petitioner's application to appeal.

Thereafter, a petition for writ of certiorari was filed in this Court on August 23, 2001 and denied on October 29, 2001. Wellons v. Turpin, 523 U.S. 1001 (2001).

D. **FEDERAL HABEAS CORPUS PETITION**

Even prior to the dismissal of Petitioner's petition for writ of certiorari, Petitioner filed his Petition for Writ of Federal Habeas Corpus in the United States District Court on May 18, 2001. In his federal habeas corpus petition, Petitioner again alleged his claim of juror misconduct in that the jurors' giving of the inappropriate gift demonstrated racial bias against Petitioner. The federal habeas court determined that, although the state habeas court had ruled this claim was barred from its review based on the doctrine of *res judicata*, Petitioner's claim of juror misconduct was actually procedurally defaulted as "the claim was actually procedurally barred because Petitioner did not raise the claim in his appeal." (Petitioner's Appendix C, p. 24). In making this determination, the federal habeas court explained:

> In his reply brief, Petitioner initially acknowledged that Ground 28 was not raised on direct appeal, [Doc. 17 at 23-24], but in his final brief, he now argues that the claim was presented in his appeal. In support of this latest assertion, Petitioner points to the statement from his appeal brief that "It is hard to imagine that jurors would present such a gift to a judge without some personal relationship beyond that exhibited in the courtroom," [Doc. 60 at 23]. Petitioner does not attempt to demonstrate how this statement indicates or argues bias on the part of the jurors against Petitioner, and a plain reading of the statement clearly demonstrates that it refers to a purportedly questionable relationship between the

> jurors and the judge. **Accordingly, this Court again finds that Petitioner did not raise this claim in his appeal, and, because Petitioner has not argued cause and prejudice, Ground 28 remains procedurally barred before this Court.**

(Emphasis added).

As to the state habeas court's erroneous finding that the issue was barred under *res judicata*, the federal habeas court held that the state habeas court had erred in its determination of the procedural bar and that Petitioner's juror misconduct claim was instead procedurally defaulted.

Moreover, the federal habeas court gave Petitioner an opportunity to brief the issue of whether the juror misconduct claim was not procedurally defaulted, and if not procedurally defaulted, ordered that Petitioner could renew his request for an evidentiary hearing. However, in subsequent briefing, Petitioner acknowledged that this claim was not raised on direct appeal, but did not brief the cause and prejudice standard necessary to overcome his default of this claim.

The federal habeas court denied relief on February 20, 2007. Subsequently, on July 27, 2007, the district court granted Petitioner a certificate of appealability. The Eleventh Circuit Court of Appeals expanded the issues for appeal on January 11, 2007.

E. ELEVENTH CIRCUIT COURT OF APPEALS

In concluding that the district court was correct in not reviewing Petitioner's claims of juror/judge/bailiff misconduct on the merits, the Eleventh Circuit Court of Appeals held:

> When Wellons first learned of the chocolate "gifts" and the judge's conversation with jurors at the restaurant during defense counsel's post-trial interviews of the jurors, Wellons immediately moved for a new trial and to recuse the trial judge, who denied both motions. Wellons later raised the claims on direct appeal, and the Georgia Supreme Court rejected these claims as meritless. See Wellons, 463 S.E.2d at 880. On state habeas review, the Superior Court of Butts County did not address these claims, concluding that the Georgia Supreme Court's decision on direct review rendered them *res judicata*. As the state habeas court's ruling regarding these claims rests on an adequate and independent state procedural ground, the district court correctly found these claims procedurally barred from federal habeas review. n6
>
> > Contrary to Wellons's argument, whether the state habeas court properly concluded that these claims were barred pursuant to Georgia's procedural default rules or the state's doctrine of *res judicata* is irrelevant to our procedural default analysis. Under either scenario, the state habeas court's ruling rested on independent and adequate procedural grounds.
>
> Nevertheless, the district court allowed Wellons, in another round of briefing, to respond to the procedural bar with a showing of cause and prejudice. Wellons never presented such arguments. **Because Wellons has demonstrated neither "cause and prejudice" nor "actual innocence" to overcome the procedural bar, his claims of judge, juror, and bailiff misconduct were not properly before the district court.** We

> therefore conclude that the district court did not abuse its discretion in denying Wellons's requests for discovery or an evidentiary hearing on these procedurally barred claims.
>
> **Even if we assume that Wellons's misconduct claims are not procedurally barred, they do not entitle Wellons to habeas relief.** The constitutional minimum established by the Due Process Clause requires that a criminal defendant receive a "fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Bracy, 520 U.S. at 904-05, 117 S. Ct. at 1797 (internal quotation marks and citation omitted). Due process also ensures the right to an impartial jury and that the fate of a defendant in a capital case not be decided by jurors harboring racial bias against him. Morgan v. Illinois, 504 U.S. 719, 729-31, 112 S. Ct. 2222, 2230, 119 L. Ed. 2d 492 (1992).

Wellons v. Hall, 554 F.3d 923, 936 (11th Cir. 2009). (Emphasis added).

III. REASONS FOR NOT GRANTING THE WRIT

A. THE ELEVENTH CIRCUIT'S PRECEDENT DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT AND PETITIONER HAS RECEIVED FULL REVIEW OF HIS CLAIMS.

Although the Eleventh Circuit in Wellons improperly found the state law doctrine of *res judicata* was an adequate and independent ground procedurally barring federal habeas review, certiorari review is not warranted as the Eleventh Circuit has already overruled that procedural bar analysis in Wellons, finding it conflicted with this Court's holding in Cone v. Bell,

556 U.S. ___, 129 S. Ct. 1769 (2009). See Owen v. Sec. for the Dept. of Corrections, 568 F.3d 894 (11th cir. 2009). Further, specifically as to Petitioner, both the federal habeas court and the Eleventh Circuit properly concluded that Petitioner failed to establish cause and prejudice or a miscarriage of justice and further rejected his claims on the merits.

In Owen, the Eleventh Circuit expressly overruled their prior decision in Wellons, holding:

> The United States Supreme Court recently has made clear that when a state court denies collateral review on the ground that the claim was already decided on direct appeal, that state ruling does not bar federal review: When a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review. ... When a state court refuses to readjudicate a claim on the ground that it has been previously determined, the court's decision does not indicate that the claim has been procedurally defaulted. To the contrary, it provides strong evidence that the claim has already been given full consideration by the state courts and thus is ripe for federal adjudication.
>
> A claim is procedurally barred when it has not been fairly presented to the state courts for their initial consideration -- not when the claim has been presented more than once. Cone v. Bell, 556 U.S. ___, 129 S. Ct. 1769, 173 L. Ed. 2d 701, 2009 WL 1118709, at *10-11 (Apr. 28, 2009)(citation omitted); accord LeCroy v. Sec'y, Fla. Dep't of Corr., 421 F.3d 1237, 1260 (11th Cir. 2005) (discussing claim held procedurally barred on state collateral review because "it either was or could have been raised on direct appeal," and stating that if claim "was raised on direct appeal in state court, it was necessarily ruled upon and might very

well be foreclosed from state collateral attack, but it would be available in the federal case as an exhausted claim" (quotation marks and brackets omitted)); Smith v. Dugger, 840 F.2d 787, 791 (11th Cir. 1988) (same). n23

> n23 We have recently muddied the waters in this area. See Wellons v. Hall, 554 F.3d 923, 936 & n.6 (11th Cir. 2009) v. Hall, 554 F.3d 923, 936 & n.6 (11th Cir. 2009) (concluding that claim raised and rejected on merits on direct appeal, then re-raised in state habeas and rejected there on res judicata grounds, was procedurally barred from federal habeas review). Wellons's conclusion as to procedural bar conflicts with our earlier precedent in LeCroy and Smith, though, and does not bind us. See United States v. Ohayon, 483 F.3d 1281, 1289 (11th Cir. 2007) ("When a decision of this Court conflicts with an earlier decision that has not been overturned en banc, we are bound by the earlier decision."). **In any event, the Supreme Court's pronouncement in Cone overrules that part of the Wellons decision.**

Owen, 568 F.3d at 915. (Emphasis added). Accordingly, insofar as Petitioner is seeking certiorari review to address a conflict between Eleventh Circuit law and this Court's precedent, the issue is moot. Certiorari review is not warranted.

Further, insofar as Petitioner is seeking certiorari review to address the Eleventh Circuit's ruling specifically as to his case, the Eleventh Circuit concluded that Petitioner had failed to establish cause and prejudice or a miscarriage of justice to overcome any procedural bar preventing review by the federal

courts and further found that the claims did not entitle Petitioner to relief. Thus, any review Petitioner would receive from the granting of certiorari by this Court has already been conducted by the Eleventh Circuit.

The Eleventh Circuit found, as Petitioner has argued, that these claims were not procedurally defaulted, but had been raised in the state courts below. Although the Eleventh Circuit found Petitioner had to establish cause and prejudice or a miscarriage of justice to overcome the procedural bar, a finding which the Eleventh Circuit overruled in Owens, the Court further conducted a "merits" review of Petitioner's claims and found that Petitioner would not be entitled to relief. Accordingly, Petitioner has already received a full review of his claims.

In finding that Petitioner had failed to establish that he was entitled to habeas relief as to these claims, the Eleventh Circuit held:

> Even if we assume that Wellons's misconduct claims are not procedurally barred, they do not entitle Wellons to habeas relief. The constitutional minimum established by the Due Process Clause requires that a criminal defendant receive a "fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Bracy, 520 U.S. at 904-05, 117 S. Ct. at 1797 (internal quotation marks and citation omitted). Due process also ensures the right to an impartial jury and that the fate of a defendant in a capital case not be decided by jurors harboring racial

bias against him. Morgan v. Illinois, 504 U.S. 719, 729-31, 112 S. Ct. 2222, 2230, 119 L. Ed. 2d 492 (1992).

Wellons's alleged evidence of the jury's racial bias against him is grounded in his speculation as to the meaning underlying the jurors' chocolate "gifts" to the judge and bailiff. Wellons's claims of bias by the judge and bailiff are also grounded in the surmise attached to their passive receipt of these gifts. The Georgia Supreme Court reviewed Wellons's claims under Uniform Superior Court Rule 25.1, which requires a trial judge presented with a motion to recuse to "determine whether, assuming the truth of any of the facts alleged, a reasonable person might conclude that the judge harbors a bias, stemming from an extra-judicial source, which is of such a nature and intensity that it would impede the exercise of impartial judgment." Wellons, 463 S.E.2d at 880. After examining Wellons's supporting affidavits, the Georgia court concluded that, assuming that Wellons's allegations regarding the gifts and the trial judge's communication with the jurors in a restaurant were true, there was no basis for finding that judicial bias existed. In light of the evidence presented before the Georgia Supreme Court, its determination is not based on an unreasonable determination of the facts.

The other misconduct claim stems from the trial judge's *ex parte* conversation with the jurors at the restaurant, which the judge never recounted on the record. *Ex parte* communications between the judge and jury are improper and, where they are of serious concern, the prejudice caused by such communications may mandate habeas relief. See Rushen v. Spain, 464 U.S. 114, 119, 104 S. Ct. 453, 456, 78 L. Ed. 2d 267 (1983) (per curiam). Improper though it may be, the occurrence of an unrecorded *ex parte* communication between a trial judge and juror, standing alone, does not require that a conviction be overturned. See id. at 117-18, 104 S. Ct. at 455 (explaining that the deprivation of a criminal defendant's right to personal presence at all critical stages is subject to

harmless error analysis and stating, "the Constitution does not require a new trial every time a juror has been placed in a potentially compromising situation" (internal quotation marks omitted)).

As the Supreme Court has recognized, the day-to-day realities of courtroom life make it "virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." Id. at 118, 104 S. Ct. at 456 (internal quotation marks omitted). With respect to judge-juror contact, "[t]here is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial." Id., 104 S. Ct. at 455-56. Generally, if the communication relates to some aspect of the trial, the judge should disclose it to counsel for all parties, and--especially in the context of a murder trial--she should do so on the record. See id. at 119, 104 S. Ct. at 456. In this case, Wellons argues that the judge's failure to disclose the communication perpetuated a veil of secrecy over the jurors' bias against him. Any prejudice caused by a judge's failure to make this disclosure "can normally be determined by a post-trial hearing[;] [t]he adequacy of any remedy is determined solely by its ability to mitigate constitutional error, if any, that has occurred." Id. at 119-20, 104 S. Ct. at 455. While there was no immediate post-trial hearing in this case that recounted the factual basis of the claim, the issues related to the judge's *ex parte* communication and the jurors' alleged bias were heard by the Georgia Supreme Court, which found no basis for concluding judicial bias existed. Wellons, 463 S.E.2d at 880. The Georgia Supreme Court's judgment as to the substance and effect of the *ex parte* communication is a finding of fact to which we apply a presumption of correctness and may overturn "only if it lacks even fair support in the record." Spain, 464 U.S. at 120, 104 S. Ct. at 456 (internal quotation marks and alteration omitted). There is no indication in the record that the communication created judicial or juror bias so as to deprive Wellons of a fair trial. Thus, even if these claims

> were properly before us on habeas review, we would not disturb the Georgia Supreme Court's conclusion on the merits of these claims.

Wellons v. Hall, 554 F.3d 923, 938 (11th Cir. 2009).

As the Eleventh Circuit has already addressed and overruled the procedural bar analysis conducted in Wellons and has clearly set forth an analysis in direct accordance with Cone and as Petitioner has received an exhaustive review of his claims, certiorari review should be denied.

B. THE ELEVENTH CIRCUIT'S FACT-SPECIFIC APPLICATION OF WELL-ESTABLISHED FEDERAL PRECEDENT PROVIDES NO ISSUE WARRRANTING CERTIORARI REVIEW.

The Eleventh Circuit's fact-specific application of this Court's precedent in properly concluding that the federal habeas court correctly denied Petitioner discovery and a federal evidentiary hearing on his claims of judge/juror/bailiff misconduct does not warrant this Court's granting of certiorari review.

In concluding that the federal habeas court properly denied Petitioner's requests for discovery and a federal evidentiary

hearing on his claims of juror/bailiff/judge misconduct, the Eleventh Circuit held:

> "A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." Bracy v. Gramley, 520 U.S. 899, 904, 117 S. Ct. 1793, 1796-97, 138 L. Ed. 2d 97 (1997). Thus, while the Federal Rules of Civil Procedure do not apply in federal habeas, the Supreme Court has fashioned certain discovery rules for habeas pursuant to its authority under the All Writs Act, 28 U.S.C. § 1651. Bracy, 520 U.S. at 904, 117 S. Ct. at 1797. The most pertinent rule provides:
>
> > A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. Rule 6(a), Rules Governing § 2254 Cases (quoted in Bracy, 520 U.S. at 904, 117 S. Ct. at 1797).
>
> When deciding whether to grant a federal habeas petitioner's request for an evidentiary hearing, "**a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.**" Landrigan, ___ U.S.___, 127 S. Ct. at 1940. Because AEDPA provides great deference to state-court determinations, "a federal court must take into account those standards [of review] in deciding whether an evidentiary hearing is appropriate." Id. "**It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.**" Id.

Wellons was not entitled to discovery or an evidentiary hearing because the record reveals that his claims of judge, juror, and bailiff misconduct are procedurally barred from federal habeas review. With due consideration of comity and finality on collateral

> review of state criminal convictions, "federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds." Dretke v. Haley, 541 U.S. 386, 392, 124 S. Ct. 1847, 1852, 158 L. Ed. 2d 659 (2004); see also Wainwright v. Sykes, 433 U.S. 72, 86-87, 97 S. Ct. 2497, 2506, 53 L. Ed. 2d 594 (1977). Because principles of fundamental fairness rest at the core of the writ of habeas corpus, the Court has "recognized an equitable exception to the bar when a habeas applicant can demonstrate cause and prejudice for the procedural default." Haley, 541 U.S. at 393, 124 S. Ct. at 1852. And, to guard against a fundamental miscarriage of justice, a petitioner may still be entitled to habeas absent a showing of cause and prejudice if he is actually innocent. Id. Under this narrow "actual innocence" exception, the petitioner must establish "'by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.'" Id. (quoting Sawyer v. Whitley, 505 U.S. 333, 336, 112 S. Ct. 2514, 2517, 120 L. Ed. 2d 269 (1992)).
>
> When Wellons first learned of the chocolate "gifts" and the judge's conversation with jurors at the restaurant during defense counsel's post-trial interviews of the jurors, Wellons immediately moved for a new trial and to recuse the trial judge, who denied both motions. Wellons later raised the claims on direct appeal, and the Georgia Supreme Court rejected these claims as meritless. See Wellons, 463 S.E.2d at 880. On state habeas review, the Superior Court of Butts County did not address these claims, concluding that the Georgia Supreme Court's decision on direct review rendered them *res judicata*.

Wellons v. Hall, 554 F3d at 935.

The Eleventh Circuit further held that regardless of the procedural bar, (default or *res judicata*), "the district court allowed Wellons, in another round of briefing, to respond to the

procedural bar with a showing of cause and prejudice. Wellons never presented such arguments." Id. at 936. The Eleventh Circuit concluded that because Petitioner had not demonstrated "cause and prejudice" or "actual innocence" to overcome the procedural bar, his claims were not properly before the district court. Id. Thus, the Eleventh Circuit found that the "district court did not abuse its discretion in denying Wellons's requests for discovery or an evidentiary hearing on these procedurally barred claims." Id.

Moreover, as set forth above, with regard to the claims Petitioner wishes to raise to this Court, the Eleventh Circuit went on to hold, "[e]ven if we assume that Wellons's misconduct claims are not procedurally barred, they do not entitle Wellons to habeas relief." Wellons v. Hall, 554 F.3d 923, 936-938 (11th Cir. 2009).

Thus, the Eleventh Circuit concluded that Petitioner was not entitled to an evidentiary hearing as his claims were procedurally defaulted and he had failed to even attempt to show cause and prejudice to overcome the default, and further that Petitioner would not be entitled to an evidentiary hearing, if not defaulted, because he had failed to show the factual allegations, if true, would entitle him to relief. This

analysis is in direct accordance with this Court's precedent. See Schriro v. Landrigan, 550 U.S. 465 (2007). Further, any review Petitioner would receive from the granting of certiorari by this Court has already been conducted by the Eleventh Circuit.

Additionally, although Petitioner repeatedly asserts he has never had the opportunity to litigate these claims by questioning witnesses, the record shows to the contrary. The record establishes that at the motion for new trial proceedings Petitioner was aware of his juror/bailiff/judge misconduct claims. However, Petitioner only presented the affidavit of his attorney. He did not even attempt to subpoena and question jurors or others in those proceedings. Moreover, Petitioner did not claim racial bias in the direct appeal proceedings.

Later, in the state habeas proceedings, although Petitioner was not allowed to introduce evidence with regard to the barred claims, Petitioner proffered the testimony of six jurors and the trial court reporter. The extent of that proffer was the trial judge briefly spoke to the jurors in a restaurant during their sequestration and that the inappropriate gifts were given to the trial judge and the bailiff at the conclusion of the trial. (See Petitioner's Appendix C, pp. 35-38). The proffer did not

allege or even hint at racial bias or that the judge's brief comments to the jurors at the restaurant had anything to do with Petitioner or Petitioner's case.

The federal habeas court, while noting that the state habeas judge did not allow a hearing on the claims, (Petitioner's Appendix C, p. P34), also noted that the state court did not carte blanche prohibit Petitioner from contacting the jurors. The record establishes that, at the December 3, 1997 pre-evidentiary hearing in the state habeas corpus court, the state habeas court instructed Petitioner that although he would not be allowed to depose the trial jurors, Petitioner could tender any affidavits from anyone willing to give him an affidavit to support his claim of judicial/bailiff/juror misconduct.[2]

Subsequently, the federal habeas court also reviewed the proffer from the state habeas court, (Petitioner's Appendix C, p. 31), and concluded that Petitioner had "failed to demonstrate a reasonable probability that he is entitled to relief on his

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[2] As noted by the federal habeas court, the state habeas court directed that if the *either* party wanted to contact the jurors, to inform the judge of the names and addresses of the jurors they intended to contact so that the judge could write the jurors and inform them of their rights not to discuss the case if they so chose. (Petitioner's Appendix, C, p. P34).

misconduct claims, and a hearing will not provide any information that would change the outcome of this action." Id.[3] That finding was properly affirmed by the Eleventh Circuit properly utilizing the precedent of this Court. Wellons, 554 F.3d at 936.

As the Eleventh Circuit properly utilized the applicable precedent of this Court in making its fact-specific application in that the federal habeas court did not err in denying Petitioner a federal habeas corpus evidentiary hearing, certiorari review is not warranted.

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[3] As to the judge stopping by the restaurant where the jurors were having dinner, the federal habeas court found that "there is no indication that anything improper occurred" and that Petitioner "has presented not even the suggestion that the purported communication concerned the criminal case." (Petitioner's Appendix C, p. P42 (citing Rushen v. Spain, 464 U.S. 114, 118-119 (1983)(judge who inquired of a juror into the well-being of that juror and said hello has done nothing to prejudice either party))).

The federal habeas court concluded that "even if we accept Petitioner's argument that the inappropriate gifts were the result of an improper relationship between the judge and the jury, Petitioner has failed to establish how the inappropriate relationship resulted in prejudicial influence or coercion or caused the jurors to consider extrinsic evidence." (Petitioner's Appendix C, pp. 44-45).

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court deny the instant petition for a writ of certiorari seeking review of the decision of the Eleventh Circuit affirming the denial of federal habeas corpus relief to Petitioner.

Respectfully submitted,

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COMPLIANCE WITH WORD LIMITATIONS

This brief complies with Rule 33 of this Court in that it consists of 6,237 words.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing pleading, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

Jeffrey Ertel
Federal Defender Program
100 Peachtree Street
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This 12th day of August, 2009.

BETH ATTAWAY BURTON
Senior Assistant Attorney General

PER CURIAM

SUPREME COURT OF THE UNITED STATES

MARCUS A. WELLONS *v.* HILTON HALL, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09–5731. Decided January 19, 2010

PER CURIAM.

From beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect. The disturbing facts of this case raise serious questions concerning the conduct of the trial, and this petition raises a serious question about whether the Court of Appeals carefully reviewed those facts before addressing petitioner's constitutional claims. We know that the Court of Appeals committed the same procedural error that we corrected in *Cone* v. *Bell*, 556 U. S. ___, ___ (2009) (slip op., at 17–18). We do not know how the court would have ruled if it had the benefit of our decision in that case.

Petitioner Marcus Wellons was convicted in Georgia state court of rape and murder and sentenced to death. Although the trial looked typical, there were unusual events going on behind the scenes. Only after the trial did defense counsel learn that there had been unreported *ex parte* contacts between the jury and the judge, that jurors and a bailiff had planned a reunion, and that "either during or immediately following the penalty phase, some jury members gave the trial judge chocolate shaped as male genitalia and the bailiff chocolate shaped as female breasts," 554 F. 3d 923, 930 (CA11 2009). The judge had not reported any of this to the defense.

Neither Wellons nor any court has ascertained exactly what went on at this capital trial or what prompted such "gifts." Wellons has repeatedly tried, in both state and federal court, to find out what occurred, but he has found

himself caught in a procedural morass: He raised the issue on direct appeal but was constrained by the nonexistent record, and the State Supreme Court affirmed his conviction and sentence. *Wellons* v. *State*, 266 Ga. 77, 88, 463 S. E. 2d 868, 880 (1995). He sought state habeas relief and moved to develop evidence. But the court held that the matter had been decided on appeal and thus was res judicata. See 554 F. 3d, at 932. He raised the issue again in his federal habeas petition, seeking discovery and an evidentiary hearing. But the District Court "concluded that Wellons' claims . . . were procedurally barred, and accordingly denied his motion for an evidentiary hearing on these claims." *Id.*, at 933.[1] Before the Eleventh Cir-

[1] Although the District Court found most of petitioner's claims to be procedurally barred, it alternatively declined to permit an evidentiary hearing because Wellons did not have enough evidence of bias or misconduct. JUSTICE ALITO wrongly suggests that the District Court reached that conclusion by reviewing a proffer that Wellons' attorneys assembled by "contacting all but 1 of the jurors," many of whom "spoke freely." *Post*, at 2 (dissenting opinion). Even apart from the fact that these interviews were informal and unsworn, they shed almost no light on what had occurred. The juror who allegedly "gave the penis to the judge," App. C to Pet. for Cert. 36, was "hostile and refused to talk," *id.*, at 37; one "refused to talk about the trial," *id.*, at 36; another "did not want to talk about the case," *id.*, at 37; and one "conferr[ed]" with his wife who then "slammed and bolted the door," *ibid.* Of those jurors who were willing to talk at all, one admitted to being "concerned that she might say something that would be used for a mistrial," *id.*, at 35, and none admitted to knowing how or why the jury selected its "gifts," see *id.*, at 35–36, 37. (Implausibly, JUSTICE ALITO suggests that Wellons' lawyers may not have asked how or why the jury selected its "gifts," *post*, at 3, though he bases that speculation only on the fact that no *questions* appeared in the proffer of *facts*.) Rather, the jurors discussed other matters and did so in the briefest of terms. All told, "everything that Petitioner . . . learned," App. C to Pet. for Cert. 38, filled only a few sheets of paper, see *id.*, at 35–36, 37.

Moreover, the subjects that the jurors did discuss may very well support Wellons' view that his trial was tainted by bias or misconduct. For example, one interviewee "was surprised" that a fellow juror had been allowed to serve on a capital trial, given that her sister had been

cuit, Wellons "argue[d] that the district court erred in denying his motions for discovery and an evidentiary hearing to develop his judge, juror, and bailiff misconduct claims because they are not procedurally barred." *Id.*, at 935. The court disagreed, holding that Wellons' claims were procedurally barred. *Ibid.*

As our dissenting colleagues acknowledge, *post*, at 1 (opinion of SCALIA, J.); *post*, at 1 (opinion of ALITO, J.), the Eleventh Circuit's holding was an error under *Cone*, 556 U. S., at ___ (slip op., at 17–18). "When a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review." *Id.*, at __ (slip op., at 17). Both dissenting opinions assume that "the issue on which *Cone* throws light does not affect the outcome" because "the Eleventh Circuit . . . also decided that petitioner was not entitled to habeas relief *on the merits*." *Post*, at 1–2 (opinion of SCALIA, J.). Having found a procedural bar, however, the Eleventh Circuit had no need to address whether petitioner was otherwise entitled to an evidentiary hearing and gave this question, at most, perfunctory consideration that may well have turned on the District Court's finding of a procedural bar.

Although Wellons appealed the denial of "his motions for discovery and an evidentiary hearing," 554 F. 3d, at 935, the Eleventh Circuit did not purport to address the merits of *that* issue at all.[2] The court stated only that "[e]ven if we assume that Wellons's misconduct claims are not procedurally barred, they do not entitle Wellons to

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murdered by a man after he completed serving a life sentence. *Id.*, at 36.

[2] As JUSTICE ALITO explains at some length, see *post*, at 2–4, the *District Court* did discuss the merits of that issue, but the District Court's analysis has little relevance on whether the Court of Appeals made an alternative holding or rather affirmed the District Court's decision on the ground that petitioner's claim was procedurally barred.

habeas *relief*." *Id.*, at 936 (emphasis added). This opaque statement appears to address only whether petitioner was entitled to ultimate relief in the form of a new trial, not whether petitioner's allegations, combined with the facts he had learned, entitled him to the discovery and evidentiary hearing that he sought.

The Eleventh Circuit's reasoning does not suggest otherwise. The court observed that Wellons' claims of misconduct were "grounded in his speculation as to the meaning underlying the jurors' chocolate 'gifts'" and "the surmise attached to their passive receipt of these gifts." *Ibid.* This statement likewise indicates only that on the existing record, habeas relief was inappropriate, not that an evidentiary hearing should be denied. After all, had there been discovery or an evidentiary hearing, Wellons may have been able to present more than "speculation" and "surmise." The Eleventh Circuit also pointed to the state court's decision on direct appeal, see *id.*, at 937, and reviewed that decision "[i]n light of the evidence presented before the Georgia Supreme Court," *ibid.* This, too, is typical of a court reviewing the denial of habeas relief, not the denial of discovery or an evidentiary hearing.[3]

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[3] JUSTICE ALITO asserts that the Eleventh Circuit "stated in unequivocal terms that its holding on the merits of petitioner's claim was independent of its holding on the question of procedural default." *Post*, at 1. But that does not address the question: The merits of what? The question whether to grant habeas relief or whether to permit discovery and an evidentiary hearing?

Contrary to our dissenting colleagues, *post*, at 4 (opinion of ALITO, J.), we do not find it dispositive that the section of the Eleventh Circuit's opinion about judge, juror, and bailiff misconduct began with a full page statement of the standard of review, which in turn included a sentence about the circumstances under which an evidentiary hearing is warranted. See 554 F. 3d, at 934–935. Immediately following the standard of review that JUSTICE ALITO quotes, the panel explained that "'if the record . . . precludes habeas relief, a district court is not required to hold an evidentiary hearing,'" and that "the record reveals that [Wellons'] claims . . . are procedurally barred." *Id.*, at 935.

Moreover, even assuming that the Eleventh Circuit intended to address Wellons' motions for discovery and an evidentiary hearing, we cannot be sure that its reasoning really was independent of the *Cone* error. The fact that his claims rested on "speculation" and "surmise" was due to the absence of a record, which was in part based on the *Cone* error. And as the Eleventh Circuit's reasoning turned on "the evidence presented before the Georgia Supreme Court," 554 F. 3d, at 937, there is serious doubt about whether it necessarily relied on the very holes in the record that Wellons was trying to fill.

Our dissenting colleagues allege that the Court is "degrad[ing] . . . our traditional requirements for a GVR." *Post*, at 2 (opinion of SCALIA, J.); see *post*, at 4 (opinion of ALITO, J.). But the standard for an order granting certiorari, vacating the judgment below, and remanding the case (GVR) remains as it always has been: A GVR is appropriate when "intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the

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Moreover, the allegedly "unequivocal" holding that JUSTICE ALITO quotes was preceded by a discussion of the deference owed under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to the "Georgia Supreme Court's judgment as to the substance and effect of the ex parte communication." *Id.*, at 937. This is the classic formulation of a decision of whether to grant habeas relief. Indeed, it would be bizarre if a federal court had to defer to state-court factual findings, made without any evidentiary record, in order to decide whether it could create an evidentiary record to decide whether the factual findings were erroneous. If that were the case, then almost no habeas petitioner could ever get an evidentiary hearing: So long as the state court found a fact that the petitioner was trying to disprove through the presentation of evidence, then there could be no hearing. AEDPA does not require such a crabbed and illogical approach to habeas procedures, and there is no reason to believe that the Eleventh Circuit thought otherwise.

ultimate outcome" of the matter. *Lawrence* v. *Chater*, 516 U. S. 163, 167 (1996) *(per curiam)*. As already discussed, there is, at least, a "reasonable probability," *ibid.*, that the denial of discovery and an evidentiary hearing rested in part on the *Cone* error. And in light of the unusual facts of the case, a "redetermination may determine the ultimate outcome," 516 U. S., at 167; cf. *Williams* v. *Taylor*, 529 U. S. 420, 442 (2000) (holding that several "omissions as a whole disclose the need for an evidentiary hearing"); *Smith* v. *Phillips*, 455 U. S. 209, 215 (1982) ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has an opportunity to prove actual bias"). The Eleventh Circuit's opinion is ambiguous in significant respects. It would be highly inappropriate to assume away that ambiguity in respondent's favor. That is especially so in a case in which petitioner's allegations and the unusual facts raise a serious question about the fairness of a capital trial.

Both dissenting opinions suggest that if there is a strong case for discovery and an evidentiary hearing, then the Court "should summarily reverse or set the case for argument." *Post*, at 2 (opinion of SCALIA, J.); see also *post*, at 4–5 (opinion of ALITO, J.). But as we have explained, "a GVR order conserves the scarce resources of this Court," "assists the court below by flagging a particular issue that it does not appear to have fully considered," and "assists this Court by procuring the benefit of the lower court's insight before we rule on the merits." *Lawrence*, *supra*, at 167.

Unlike JUSTICE SCALIA, *post*, at 3, we do not believe that a "self-respecting" court of appeals would or should respond to our remand order with a "summary reissuance" of essentially the same opinion, absent the procedural default discussion. To the contrary, in light of our decision in *Cone*, we assume the court will consider, on the merits, whether petitioner's allegations together with the undis-

puted facts, warrant discovery and an evidentiary hearing.

The petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit and the motion of petitioner for leave to proceed *in forma pauperis* are granted. The judgment is vacated, and the case is remanded to the Eleventh Circuit for further consideration in light of *Cone* v. *Bell*, 556 U. S., at ___ (slip op., at 17–18).

SUPREME COURT OF THE UNITED STATES

MARCUS A. WELLONS *v.* HILTON HALL, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09–5731. Decided January 19, 2010

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

Petitioner Marcus Wellons was convicted in Georgia state court of capital murder and sentenced to death. After exhausting direct appeal and state postconviction review, he filed a petition for habeas corpus in federal court under 28 U. S. C. §2254. Wellons claims, among other things, that misconduct on the part of the trial judge, jurors, and court bailiff deprived him of a fair trial. The District Court denied relief, and the Eleventh Circuit affirmed.

Today the Court grants Wellons' petition for certiorari, vacates the judgment of the Eleventh Circuit, and remands ("GVRs") in light of *Cone* v. *Bell*, 556 U. S. ___ (2009). The Eleventh Circuit concluded that Wellons' claims were procedurally barred because the state postconviction court, noting that the State Supreme Court had rejected them on direct appeal, held the claims were res judicata. See 554 F. 3d 923, 936, and n. 6 (2009). This was error under *Cone*, see 556 U. S., at ___–___ (slip op., at 17–18), as respondent recognizes; indeed, the Eleventh Circuit has already recognized the abrogation of the opinion below on this point, see *Owen* v. *Secretary for Dept. of Corrections*, 568 F. 3d 894, 915, n. 23, (2009). But, as JUSTICE ALITO's dissent demonstrates, *post*, p. ___, the Eleventh Circuit (like the District Court) also decided that petitioner was not entitled to habeas relief *on the merits*. 554 F. 3d, at 936–938. Thus the Court GVRs in light of *Cone* even though the issue on which *Cone* throws light

does not affect the outcome.

The Court has previously asserted a power to GVR whenever there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence* v. *Chater*, 516 U. S. 163, 167 (1996) *(per curiam)*. I have protested even that flabby standard, see *id.*, at 190–191 (SCALIA, J., dissenting), but today the Court outdoes itself. It GVRs where the decision below does *not* "rest upon" the objectionable faulty premise, but is independently supported by other grounds—so that redetermination of the faulty ground will assuredly *not* "determine the ultimate outcome of the litigation." The power to "revise and correct for error," which the Court has already turned into "a power to void for suspicion," *id.*, at 190 (same) (internal quotation marks and alteration omitted), has now become the power to send back for a re-do. We have no authority to decree that. If the Court thinks that the Eleventh Circuit's merits holding is wrong, then it should summarily reverse or set the case for argument; otherwise, the judgment below must stand. The same is true if (as the Court evidently believes) the Court of Appeals should have required an evidentiary hearing before resolving the merits question. If they erred in that regard their judgment should be reversed rather than remanded "in light of *Cone* v. *Bell*"—a disposition providing no hint that what we really want them to do (as the Court believes) is to consider an evidentiary hearing.

The systematic degradation of our traditional requirements for a GVR has spawned a series of unusual dispositions, including the GVR so the government can try a less extravagant argument on remand, see *Department of Interior* v. *South Dakota*, 519 U. S. 919, 921 (1996) (SCALIA, J., dissenting), the GVR in light of nothing, see

Youngblood v. *West Virginia*, 547 U. S. 867, 872 (2006) (same), and the newly-minted Summary Remand for More Extensive Opinion than Petitioner Requested (SRMEOPR), see *Webster* v. *Cooper*, 558 U. S. ___, ___ (2009) (slip op., at 3). Today the Court adds another beast to our growing menagerie: the SRIE, Summary Remand for Inconsequential Error—or, as the Court would have it, the SRTAEH, Summary Remand to Think About an Evidentiary Hearing.

It disrespects the judges of the Courts of Appeals, who are appointed and confirmed as we are, to vacate and send back their authorized judgments for inconsequential imperfection of opinion—as though we were schoolmasters grading their homework. An appropriately self-respecting response to today's summary vacatur would be summary reissuance of the same opinion, minus the discussion of *Cone*. That would also serve the purpose of minimizing the delay of justice that today's GVR achieves (Wellons has already outlived his victim by 20 years; he committed his murder in 1989).

SUPREME COURT OF THE UNITED STATES

MARCUS A. WELLONS *v.* HILTON HALL, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09–5731. Decided January 19, 2010

JUSTICE ALITO, with whom THE CHIEF JUSTICE joins, dissenting.

The Court's disposition of this case represents a misuse of our authority to grant, vacate, and remand (GVR). The decision of the Court of Appeals plainly rests on two independent grounds: first, that petitioner procedurally defaulted his claim that the judge, bailiff, and jurors had an inappropriate relationship that impaired his right to a fair trial and, second, that petitioner's claim failed on the merits. See 554 F. 3d 923, 936 (CA11 2009). While it is true that the first of these grounds is inconsistent with *Cone* v. *Bell*, 556 U. S. ___, ___ (2009) (slip op., at 17–18), there is no basis for vacating the decision below unless some recent authority or development provides a basis for reconsideration of the second ground as well. But the *per curiam* identifies no such authority. Instead, the *per curiam* uses *Cone* as a vehicle for suggesting that the Court of Appeals should reconsider its decision on the merits of petitioner's claim.

In order to defend this disposition, the *per curiam* refuses to credit the Court of Appeals' explanation of the basis of its decision. The Court of Appeals twice stated in unequivocal terms that its holding on the merits of petitioner's claim was independent of its holding on the question of procedural default. See 554 F. 3d, at 937–938 ("[E]ven if these claims were properly before us on habeas review, we would not disturb the Georgia Supreme Court's conclusion on the merits of these claims"); *id.*, at 936 ("Even if we assume that Wellons's misconduct claims are

not procedurally barred, they do not entitle Wellons to habeas relief"). But the *per curiam* states that the Court of Appeals' consideration of the merits "may well have turned on the District Court's finding of a procedural bar" and that "we cannot be sure that [the panel's] reasoning really was independent of the *Cone* error." *Ante*, at 3, 5.

Even worse, the *per curiam* unjustifiably suggests that the Court of Appeals gave at most only "perfunctory consideration" to petitioner's claim that he was entitled to an evidentiary hearing and may not have "carefully reviewed" the relevant facts. *Ante*, at 3, 1. The majority may not be satisfied with the Court of Appeals' discussion, but the majority has no good reason for suggesting that the lower court did not give the issue careful consideration.

The District Court refused petitioner's discovery request on the ground that petitioner did not make a sufficient showing to warrant interrogation of the jurors. As the detailed opinion of the District Court reveals, the state habeas judge allowed petitioner's attorneys to contact all of the jurors and relevant court personnel; the attorneys succeeded in contacting all but 1 of the jurors; 6 of the 11 jurors who were contacted, as well as the bailiffs and court reporter, were interviewed; and the attorneys made a proffer of the information provided by these interviewees.[1] There is no suggestion that the attorneys were restricted in the questions that they were permitted to ask the interviewees, and it appears that the jurors who were interviewed spoke freely, even discussing their understanding of the judge's instructions on the law and the jury's delib-

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[1] As the District Court observed, "[p]etitioner's state habeas corpus counsel contacted all but one of the jurors seeking their comments." App. C to Pet. for Cert. 34. The proffer shows that six jurors were interviewed: DeArmond, *id.*, at 35, Henry, *ibid.*, Givhan, *id.*, at 36, Humphrey, *id.*, at 37, Moore, *ibid.* and Smith, *ibid.* The Court's description of some of the matters that the jurors mentioned during the interview confirms that these jurors "spoke freely." See *ante*, at 2, n. 1.

erations.[2] Cf. Fed. Rule Evid. 606(b). Interestingly, the proffer does not reflect that the attorneys asked any of the jurors what would appear to be the most critical question, namely, why the strange gifts were given to the judge or the bailiff.[3] See App. C to Pet. for Cert. 34–38. If any such questions had been asked and answers favorable to petitioner's position had been provided, one would expect that information to appear in the proffer.

After examining the proffer made by petitioner's attorneys, the District Court concluded that this submission did not justify formal discovery. With respect to what the *per curiam* describes as the "unreported *ex parte* contacts between the jury and the judge," *ante*, at 1—which apparently consisted of a brief exchange of words that occurred

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[2]The *per curiam* assumes that the jurors who were interviewed must have spoken only "in the briefest of terms" because "'everything that Petitioner. . . learned'" "filled only a few sheets of paper." *Ibid.* The mere fact that the unsworn proffer submitted by petitioner's state habeas counsel consisted of four pages, see App. C to Pet. for Cert. 35–38, does not seem to me to provide a sufficient basis for concluding that the jurors interviewed spoke only "in the briefest of terms." The length of the proffer is equally consistent with the possibility that the jurors interviewed spoke at length but did not supply information that petitioner's counsel deemed helpful to his case.

[3]The main reason for the interviews was to inquire about the gifts, and the proffer shows that the jurors who were interviewed discussed this matter. See, *e.g.*, App. C to Pet. for Cert. 35 (a juror "stated that 'we,' the jurors gave a pair of chocolate breasts to the bailiff and the chocolate penis just followed"); *ibid.* (a juror "stated that some of the jurors decided to send a pair of edible chocolate breasts to one of the female bailiffs and an edible chocolate penis to the trial judge"); *id.*, at 37 (a juror "remembered discussion about giving a chocolate penis to the judge"). Nevertheless, petitioner's proffer includes no information as to *why* the gifts were given—not even a statement to the effect that the jurors interviewed were asked this question and said that they did not know. Cf. *id.*, at 35 (noting that a particular juror "did not know *whose idea it was* to send the chocolate penis to the judge," but not including any representation as to her understanding of *why* the gifts may have been given (emphasis added)).

when the judge entered the room in a restaurant where the jurors were dining—the District Court concluded that "nothing that Petitioner has presented provides even the slightest indication that anything more than a simple greeting occurred," App. C to Pet. for Cert. 43.

With respect to the gifts that were given to the judge and a bailiff after the trial ended, the District Court stressed that they were "inappropriate" and represented "an unusual display of poor taste in the context of a proceeding so grave as a capital trial," *ibid.*, but the Court noted that petitioner had not proffered any evidence that any of the jurors or court personnel who were interviewed had said anything that substantiated the assertion that "an inappropriate relationship existed between the judge, the bailiff, and the jury," *id.*, at 44.

A fair reading of the Court of Appeals' opinion is that that court likewise held that petitioner was not entitled to the discovery he sought because that discovery was unlikely to yield evidence substantiating his claim. See 554 F. 3d, at 935 (quoting *Schriro* v. *Landrigan*, 550 U. S. 465, 474 (2007) ("When deciding whether to grant a federal habeas petitioner's request for an evidentiary hearing, 'a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief'")).

I agree with the Court that the strange and tasteless gifts that were given to the trial judge and bailiff are facially troubling, and I am certainly not prepared at this point to say that the decision below on the discovery issue was correct. But unlike the Court, I do not think it is proper for us to use a GVR to address this matter. The lower courts have decided the discovery issue, and now this Court has two options. First, if we wish to review the question whether petitioner made a sufficient showing to justify interrogation of the jurors, we should grant the

petition for a writ of certiorari and decide that question. Second, if we do not wish to tackle that fact-bound question, we should deny review or GVR in light of a recent authority or development that casts doubt on the judgment of the court below. What the Court has done—using a GVR as a vehicle for urging the Court of Appeals to reconsider its holding on a question that is entirely independent of the ground for the GVR—is extraordinary and, in my view, improper.